(37)

No. 99-1426-CFX Title: American Trucking Associations, Inc., et al., Petitioners
v.
Carol M. Browner, Administrator of Environmental Protection Agency, et al.

Docketed:
March 1, 2000

Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Feb 28 2000	Petition for writ of certiorari filed. (Response due April 12, 2000)
	Mar 14 2000	Brief amicus curiae of Mercatus Center at George Mason filed. VIDED.
	Mar 20 2000	Brief of State Respondents in support of ATA and CAA Industry filed. VIDED.
	Mar 21 2000	Order extending time to file response to petition until April 12, 2000.
	Mar 21 2000	This extension is granted for all respondents.
	Mar 22 2000	Waiver of right of respondent Duquesne Light Co. to respond filed.
	Apr 7 2000	Waiver of right of respondents Kennecott Holdings Corporation, et al. to respond filed.
	Apr 12 2000	Waiver of right of respondents CAA Industry to respond filed. VIDED.
	Apr 12 2000	Brief of American Lung Assn. in response to conditional cross-petitions filed. VIDED.
	Apr 12 2000	Brief of Federal cross-respondents in opposition filed. VIDED.
	Apr 12 2000	Brief of respondents Citizens for Balanced Transportation, et al. in opposition filed. VIDED.
	Apr 12 2000	Brief of respondents Massachusetts and New Jersey in opposition filed. VIDED.
	Apr 25 2000	DISTRIBUTED for Conference of May 11, 2000
	Apr 25 2000	Reply brief of petitioners American Trucking Association, Inc., et al. filed.
	May 15 2000	REDISTRIBUTED for Conference of May 18, 2000
	May 22 2000	REDISTRIBUTED for Conference of May 25, 2000
	May 30 2000	Petition GRANTED. The case is set for oral argument in tandem with No. 99-1257, Browner v. American Trucking Associations. SET FOR ARGUMENT November 7, 2000. **********
	Jun 9 2000	Motion of the Solicitor General to dispense with printing the joint appendix filed.
	Jun 19 2000	Order adopting the Solicitor General's proposal for simultaneously briefing in 99-1257 and 99-1426. Opening briefs for the petitioners in 99-1257 and 99-1426; opening briefs for respondents supporting those petitioners are due on or before July 21, 2000. Briefs for respondents opposing petitioners in 99-1257 and 99-1426 are due on or before September 11, 2000. Reply briefs are due on or before October 6, 2000. These briefs are to be filed with the Clerk and served upon

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Entry	Date	Proceedings and Orders
		opposing counsel on or before 3 p.m. on the due dates. Rule 29.2 does not apply.
	Jun 21 2000	Motion of th Solicitor General to dispense with printing the joint appendix DISTRIBUTED (6/22/00).
	Jun 26 2000	Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
	Jul 20 2000	Series of EPA Publications re rulemaking sent by the Solicitor General and transmitted to Court Library LODGED.VIDE 99-1257.
	Jul 20 2000	Brief of respondents Applachian Power Company, et al. in support of petition filed.
	Jul 20 2000	Appendix of respondents Appalachian Power Company, et al. filed.
	Jul 20 2000	Brief amicus curiae of General Electric Company filed.
	Jul 21 2000	Brief of petitioners American Trucking Associations, Inc., et al. filed.
	Jul 21 2000	Brief of respondents Ohio, Michigan and West Virginia in support of petition filed.
	Jul 21 2000	Brief amici curiae of Pacific Legal Foundation, et al. filed.
	Jul 21 2000	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Jul 21 2000	Brief amici curiae of AEI-Brookings Joint Center for Regulatory Studies, et al. filed.
	Jul 21 2000	Brief amicus curiae of American Boiler Manufacturers Association filed.
	Jul 21 2000	Brief amicus curiae of Mercatus Center filed.
	Jul 21 2000	Brief amici curiae of James Inhofe, et al. filed.
	Jul 21 2000	Brief amici curiae of Orrin Hatch and Tom Bliley filed.
	Sep 8 2000	Brief of Federal Respondents filed.
	Sep 11 2000	Brief of respondents Citizens for Balanced Transportation, et al. filed.
	Sep 11 2000	Brief of respondent American Lung Association filed.
	Sep 11 2000	Brief of respondents Massachusetts & New Jersey filed.
	Sep 11 2000	LODGING consisting of one set of six Air Quality Criteria documents submitted by counsel for Massachusetts and New Jersey.
	Sep 11 2000	Brief amicus curiae of North Carolina filed.
	Sep 11 2000	Brief amici curiae of California, et al. filed.
	Sep 11 2000	Brief amicus curiae of United States Public Interest Research Group Education Fund filed.
	Sep 11 2000	Brief amici curiae of Environmental Defense, et al. filed.
	Sep 11 2000	Brief amicus curiae of Virginia filed. VIDED.
	Sep 11 2000	Brief amici curiae of Clean Air Trust and Robert Stafford filed.
	Sep 22 2000	CIRCULATED.
	Oct 5 2000	Reply brief of respondents Ohio, Michigan and West Virginia filed.
	Oct 5 2000	Reply brief of respondents Appalachian Power Co., et al. filed.
	Oct 6 2000	Reply brief of petitioners American Trucking Assn. and

No. 99-1426-CFX

Entry	Date	Proceedings and Orders
		Chamber of Commerce of the U.S. filed.
	Oct 13 2000	Motion of Ohio, et al. for divided argument DISTRIBUTED.
	Oct 20 2000	Record filed.
	Oct 25 2000	Record filed.
	Nov 7 2000	ARGUED.

Supreme Court, U.S.
FILED
991426 FEB 28 2000
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.*,*

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

PARTIES TO THE PROCEEDINGS

Cross-Petitioners are: American Trucking Associations, Inc., Chamber of Commerce of the United States, National Coalition of Petroleum Retailers, Burns Motor Freight, Inc., Garner Trucking, Inc., Genie Trucking Line, Inc., National Automobile Dealers Association, National Association of Manufacturers, National Small Business United, The American Portland Cement Alliance, The Glouster Company, Inc., Non-Ferrous Founders' Society, Equipment Manufacturers Institute, American Farm Bureau Federation, and American Road and Transportation Builders Association.

None of these cross-petitioners has any parent corporations, and no publicly traded company owns 10 percent or more of any of these cross-petitioners' stock.

Respondents, who were respondents in the court of appeals, are: Carol M. Browner, the Administrator of the Environmental Protection Agency, and the Environmental Protection Agency.

The following additional entities have filed petitions for *certiorari* from the underlying judgment of the court of appeals: the American Lung Association, the Commonwealth of Massachusetts, and the State of New Jersey.

The following additional entities participated as parties in the court of appeals: Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association), American Forest and Paper Association, American Iron and Steel Institute, American Petroleum Association, American Public Power Association, Appalachian Power Company, Atlantic City Electric Company, Baltimore Gas and Electric Company, James Bassage, Carolina Power & Light Company, Centerior Energy Corporation, Central and South West Services, Inc., Central Hudson Gas & Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, Central Power & Light Company, Chemical Manufacturers Association, CINergy Corporation, Citizens for Balanced Transportation, Cleveland Electric Company,

Columbus Southern Power Company, ComEd Company, Consumers Energy Company, Dayton Power & Light Company, Delmarva Power & Light Company, The Detroit Edison Company, Duke Energy Company, Duquesne Light Company, Edison Electric Institute, FirstEnergy Corporation, Florida Power Corporation, Michael Gregory, Idaho Mining Association, Illinois Power Company, Indiana Michigan Power Company, Indianapolis Power & Light Company, Jacksonville Electric Authority, Kansas City Power & Light Company, Judy's Bakery, Kennecott Energy and Coal Company, Kennecott Corporation, Kennecott Services Company, Kentucky Power Company, Kentucy Utilities Company, Louisville Gas and Electric Company, Madison Gas and Electric Company, David Matusow, Brain McCarthy, Meridian Gold Company, The State of Michigan, Midwest Ozone Group, Minnesota Power, Monongahela Power Company, National Association of Home Builders, National Indian Business Association, National Mining Association, National Paint and Coatings Association, National Petrochemical & Refiners Association, National Rural Electric Cooperative Association, National Stone Association, Nevada Mining Association, Newmont Gold Company, Northern Indiana Public Service Company, Oglethorpe Power Corporation, The State of Ohio, Ohio Edison Company, Ohio Power Company, Ohio Valley Electric Corporation, Oklahoma Gas & Electric Company, PacificCorp, Plains Electric Generation & Transmission Cooperative, Inc., Phoenix Cement Company, The Potomac Edison Company, Potomac Electric Power Company, PP&L Resources, Public Service Company of New Mexico, Richard Romero, Salt River Project Agricultural Improvement & Power District, Small Business Survival Committee, South Carolina Electric & Gas Company, Southern Company, Tampa Electric Company, Toledo Edison Company, Union Electric Company, United Mine Workers of America, AFL-CIO, Virginia Power, Western Fuels Association, West Penn Power Company, The State of West Virginia, West Virginia Chamber of Commerce, and Wisconsin Electric Power Company.

The following participated as *amici curiae* in the court of appeals: Representative Tom Bliley, Senator Orrin G. Hatch, New York, Connecticut, New Hampshire, and Vermont.

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The American Trucking Associations, Inc., the Chamber of Commerce of the United States, and the other "Small Business Petitioners" below (collectively "ATA"), respectfully submit this conditional cross-petition. ATA requests that its cross-petition be granted or, at a minimum, held in abeyance if the Court grants *certiorari* on any form of the first question presented in the petition filed by the Environmental Protection Agency ("EPA" or "Agency").

ATA's cross-petition presents a statutory interpretation issue that inheres in the first question presented by EPA. It also provides a vehicle for avoiding the constitutional nondelegation issue on which EPA focuses. Specifically, this conditional cross-petition asks whether the court of appeals was correct when it held, based on *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980), and its D.C. Circuit progeny, that EPA must ignore all non-health factors, including costs, in setting the National Ambient Air Quality Standards ("NAAQS").

Despite its adherence to *Lead Industries*, the court below invalidated EPA's interpretation of the Act. While this Court could do likewise, it could not possibly *uphold* either EPA's interpretation, or the regulations based on it, without first considering whether those D.C. Circuit precedents – cases never examined by this Court – were correctly decided.

For the reasons discussed in Part C, pp. 27-30, *infra*, ATA submits that a cross-petition is not technically required to preserve this issue. Nevertheless, ATA cross-petitions both to ensure that the Court fully appreciates the statutory interpretation question presented by this case, and to avoid even a remote possibility that the Court might consider itself barred from considering any aspect of that question.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-69a) is reported at 175 F.3d 1027. The opinions on the petitions for rehearing (App. 70a-101a) are reported at 195 F.3d 4.

JURISDICTION

The court of appeals entered its judgment on May 14, 1999. On October 29, 1999, timely petitions for panel rehearing were granted in part and denied in part, with suggestions for *en banc* rehearing denied in their entirety. The petitions for *certiorari* were timely filed on January 28, 2000. Supreme Court Rule 12.5 and 28 U.S.C. § 1254(1) provide the basis for jurisdiction over this conditional cross-petition, which is timely filed under Supreme Court Rule 12.5.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are central to this case:

1. Article I, Section 1 of the United States Constitution provides in relevant part: "All legislative Powers herein granted shall be vested in a Congress of the United States."

2. Relevant portions of Sections 108, 109, and 307 of the Clean Air Act are set forth in the Appendix.

STATEMENT OF THE CASE

ATA provided a Statement of the Case in its Brief in Opposition and accordingly will focus here on only those aspects of the proceedings below that are pertinent to the matters covered by this cross-petition.

Acting pursuant to its jurisdiction under Clean Air Act ("CAA" or "Act") § 307(b)(1), 42 U.S.C. § 7607(b)(1), and 5 U.S.C. § 611, the court of appeals invalidated the interpretation of Section 109(b) and related provisions of the Act used by EPA in setting new NAAQS for ozone, fine particulate matter ("$PM_{2.5}$"), and coarse particulate matter ("PM_{10}"). The court of appeals did not hold these statutory provisions unconstitutional. Instead, it agreed with the argument made by ATA below that Section 109 and related provisions must be construed in light of the Act's text, background, purpose, and statutory context to provide an

"intelligible principle" to guide the exercise of EPA's discretion. *See* App. 5a-18a, 75a-76a.

Section 109(b)(1) directs EPA's Administrator to set a primary NAAQS that is "requisite to protect the public health" with "an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). In revising the ozone NAAQS, for example, EPA confronted a wide range of options differing in three separate dimensions: the level, form, and averaging period of the standard. EPA's proposal requested comment on levels of 0.07 to 0.09 parts per million ("ppm"). *See* 61 Fed. Reg. 65,716 (Dec. 13, 1996). For each level, EPA invited comment on several different forms, including standards ranging from the second- to the fifth-highest annual exceedance *or* concentration. *Id.* at 65,730-33. As to averaging time, EPA strongly advocated changing from a one-hour to an eight-hour standard. *See id.* at 65,727. In considering this array of options, EPA's Clean Air Scientific Advisory Committee ("CASAC") concluded that "there is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public health." J.A. (Ozone) 238.

These options differed markedly in their predicted costs and attainability. EPA estimated, for example, that the cost of bringing all areas of the country into compliance with its chosen ozone standard (a 0.08 ppm, fourth-highest, eight-hour measurement) by 2010 would amount to $9.6 billion *annually*. *See* J.A. (Ozone) 2934. These costs, not to mention the predictable impact on small businesses, could be substantially reduced by, for example, setting the standard at the fifth-highest rather than the fourth-highest reading – or even more significantly, by adjusting the level from 0.08 to 0.09 ppm. *See id.* at 1975, 2929, 2969, 2995. ATA argued below that these differences mattered, especially since CASAC had found the options considered by EPA to be effectively indistinguishable from a public health standpoint. *See* Ozone Br. of Small Bus. Pet'rs at 7-8, 19-20; Ozone Reply Br. of Small Bus. Pet'rs at 7.

The court of appeals nevertheless held that it was prevented by *Lead Industries* from requiring EPA to consider the costs and attainment consequences of its standards. *See* App. 7a, 15a. That said, the panel went on to hold that the health factors mentioned by EPA, while "reasonable" as a starting point, were insufficient because they "lack[ed] any determinate criteria for drawing lines." *Id.* at 5a-6a. The court illustrated EPA's failure to "speak to the issue of degree" by reference to the Agency's justification for choosing the 0.08 ppm level for the ozone NAAQS. *See id.* at 8a-11a. As the court explained, while EPA claims to have chosen 0.08 ppm over 0.09 ppm "because more people are exposed to more serious effects at 0.09 than at 0.08," it "never contradict[ed] the intuitive proposition, confirmed by data in its Staff Paper, that reducing the [0.08] standard to [0.07] would bring about comparable changes." *Id.* at 8a.

EPA responded that "a 0.07 standard would be 'closer to peak background levels,'" but "a 0.08 level, of course, is also *closer* to these peak levels than 0.09." *Id.* at 9a (emphasis in original). Indeed, in the case of the PM standard (where EPA estimated compliance costs of at least $37 billion *annually* by 2010, *see* J.A. (PM) 3470), the court observed that similar rationales "could also be employed to justify a refusal to reduce levels below those associated with London's 'Killer Fog' of 1952." App. 11a; *see also id.* at 13a. The court of appeals thus found it inescapable that "EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power." *Id.* at 5a.

While the panel felt bound by *Lead Industries* and its progeny, it recognized that some form of cost-benefit test or similar analysis could functionally serve as the necessary "intelligible principle" to avoid an unconstitutional construction of Sections 108 and 109. *See id.* at 14a-15a. The court further acknowledged the difficulty of formulating an "intelligible principle" so long as EPA was barred from considering "any

factor other than health effects relating to pollutants in the air." *Id.* at 15a (internal quotation omitted), 18a.

The court conducted its analysis within the framework provided by this Court in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984). It thus concluded that the appropriate remedy was to remand for EPA to "develop a construction of the act that satisfies this constitutional requirement," and, "if appropriate, [to] modify the disputed NAAQS in accordance with that construction." App. 4a- 5a.

In response to EPA's petition for rehearing, the court of appeals reemphasized both that the Act *could* be interpreted to provide a constitutionally sufficient "intelligible principle," and that it is the job of EPA, not the court, to develop such an interpretation in the first instance. *See id.* at 75a. As the court explained, "just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of its delegated authority . . . . In sum, the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*." *Id.* at 76a (citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*")).

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW WAS FORCED TO CONSIDER CONSTITUTIONAL NONDELEGATION ISSUES BECAUSE THAT COURT HAD MISCONSTRUED THE CLEAN AIR ACT IN *LEAD INDUSTRIES* AND SUBSEQUENT CASES.

This case is first and foremost about how to construe what all sides recognize are the most important provisions of the Clean Air Act. This Court has never accepted review of such a case, although it has declined review on at least four occasions. *See, e.g., American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C.

Cir. 1981), *cert. denied sub nom. American Petroleum Inst. v. Gorsuch*, 455 U.S. 1034 (1982). Under the usual methods of statutory construction, the Court should first consider the statute and EPA's interpretation before addressing the lower court's use of the nondelegation doctrine as a construction tool – a tool that became relevant largely because non-health considerations were unavailable to serve as limiting principles under the *Lead Industries* line of D.C. Circuit precedent.

With *Lead Industries* as binding precedent, the court of appeals confronted an open-ended EPA interpretation that required it to use all of the tools at its disposal to determine whether EPA's construction was permissible. EPA explained its interpretation of the key statutory terms – "requisite to protect the public health" with an "adequate margin of safety" – as follows: "[T]he Administrator is not limited to any single approach to determining an adequate margin of safety and may, in the exercise of her judgment, choose an integrative approach, a two-step approach, or perhaps some other approach, depending on the particular circumstances confronting her in a given NAAQS review." 62 Fed. Reg. 38,856, 38,883 (July 18, 1997); 62 Fed. Reg. 38,652, 38,688 (July 18, 1997).

Against such a standardless assertion of authority, the panel was surely correct to deploy the nondelegation canon – and to rely on this Court's pre-*Chevron* decision in *Benzene* – as a basis for invalidating EPA's unreasonable interpretation. This Court, however, is not fettered by *Lead Industries*. It is therefore free to construe the Act afresh and deploy the nondelegation canon (or not) depending on whether it is needed after the Court's interpretive work under *Chevron* is completed. *See* Part A below.

According to the lower court, *Lead Industries* precludes EPA from considering "any factor other than health effects relating to pollutants in the air" – a construction that curtails the range of "intelligible principles" that can be derived from the Act's standard-setting provisions. *See* App. 15a (internal quotation omitted); *id.* at 14a-15a, 18a. That construction

would not matter if *Lead Industries* and progeny were correctly decided. But, as summarized below, those cases were wrong when decided and are even more clearly wrong now, after this Court's decisions in *Benzene*, *Chevron*, *Chadha*, and all of the subsequent cases following their lead. *See* Part B below.

ATA acknowledges that the validity of *Lead Industries* is so intertwined with the lower court's invalidation of EPA's statutory interpretation that this conditional cross-petition is probably not required. In particular, the ability to assert a correct construction of the Act (and hence the invalidity of *Lead Industries*) is logically entailed by any fair reading of EPA's first question presented. Nevertheless, since this point involves subtleties that might not be apparent without a cross-petition, and since the jurisprudence of cross-petitions is not without its ambiguities, ATA submits this cross-petition for the reasons elaborated in Part C below.

A. Issues Arising under the Non-Delegation Construction Canon, *Chevron* Review, Arbitrary and Capricious Review, and Statutory Interpretation Are Tightly Intertwined in This Case.

1. The Court of Appeals Properly Rejected EPA's Interpretation under *Chevron*.

As explained above, *Lead Industries* is inextricably intertwined with the first question presented because it forced the court of appeals to employ the nondelegation doctrine as a tool of statutory *interpretation* to invalidate EPA's interpretation of Section 109. Although EPA's petition drops hints of statutory invalidation, and seeks to portray the court of appeals' decision as "a radical departure from settled law respecting the nondelegation doctrine," Pet. 9, nothing could be farther from the truth.

In particular, the court below never disputed that this Court is loathe to declare statutes unconstitutional on nondelegation grounds, or, for that matter, on any grounds. *See, e.g., Hodel v. Indiana*, 452 U.S. 314, 323 (1981) ("legislative Acts . . .

come to the Court with a presumption of constitutionality") (internal quotation omitted). Instead, the appellate court properly invoked this Court's line of cases that have construed statutes narrowly to provide an "intelligible principle" for guiding agency discretion. App. 14a, 74a-76a; *see also National Cable Television Ass'n v. United States*, 415 U.S. 336, 342-43 (1974) (interpreting statute "narrowly to avoid constitutional problems" under the nondelegation doctrine).

This Court's decision in *Benzene* is the most relevant such case. In *Benzene*, a four-justice plurality (in combination with a concurrence from then-Justice Rehnquist that would have gone farther still) held that the agency interpretation before it "would make such a sweeping delegation of legislative power that it *might* be unconstitutional." 448 U.S. at 646 (emphasis added and internal quotation omitted). The Court thereupon adopted a narrowing interpretation because "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.* Like the court below, *Benzene* used the nondelegation construction canon to reject an agency's essentially standardless construction of its organic statute.

EPA's protestations notwithstanding, the court of appeals' rejection of EPA's statutory interpretation amounts to nothing more than applying these settled constitutional principles in the context of review after *Chevron*. Indeed, *Chevron* review has often been used by courts, including this one, to invalidate open-ended statutory interpretations quite analogous to the one rejected below. Just last term, for example, this Court used *Chevron* to reject the FCC's interpretation of the "necessary and impair" provisions of Section 251(d)(2) of the 1996 Telecommunications Act. It reasoned that, whereas the FCC had failed to give those terms any concrete meaning, "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act, which it has simply failed to do." *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734-35 (1999) (emphasis in original).

The D.C. Circuit has likewise used the second step of *Chevron* to reject standardless agency interpretations of key statutory terms, *see, e.g., Abbott Labs. v. Young*, 920 F.2d 984, 987-88 (D.C. Cir. 1990), especially where, as here, the agency's interpretation is so limitless as to amount to almost no interpretation at all. *See City of Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 189 (D.C. Cir. 1991). The obvious flaw in such interpretations is that they "fail[] the second step of *Chevron* because the agency seeks to exploit the ambiguity rather than to resolve it, and to advance its own policy objectives rather than Congress'." *NRDC v.* , 976 F.2d 36, 44 (D.C. Cir. 1992) (Silberman, J., concurring).

Here, EPA treated the critical statutory terms – "requisite to protect the public health" with an "adequate margin of safety" – as if they conferred just the sort of "unprecedented power over American industry" that *Benzene* understandably rejected as "unreasonable." 448 U.S. at 645. Moreover, in this case, as in *Iowa Utilities*, the Agency refused to give real meaning to key terms, asserting instead that "the Administrator is not limited to any single approach to determining an adequate margin of safety and may, in the exercise of her judgment, choose an integrative approach, a two-step approach, or perhaps some other approach, depending on the particular circumstances confronting her in a given NAAQS review." 62 Fed. Reg. at 38,883; 62 Fed. Reg. at 38,688.

As for ATA's contentions that EPA should set a "significant risk" cutoff in defining public health protection, or consider costs in setting an "adequate margin of safety," EPA unashamedly asserted that its decisions (1) need be based on "no generalized paradigm," (2) "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and (3) in any event, are "largely judgmental in nature." 62 Fed. Reg. at 38,883 (emphasis added); 62 Fed. Reg. at 38,688 (emphasis added). EPA's construction of the Act even allowed it to ignore record evidence from the Department of Energy, an OMB investigator (Lutter *et al.*), and, remarkably,

EPA's own internal analyst (Cupitt) – all of which indicated that reducing ground-level ozone by the amounts projected under EPA's revised NAAQS would lead to thousands of additional skin cancer and cataract cases each year. *See* Ozone Br. of Small Bus. Pet'rs at 21-24 (summarizing these studies); App. 45a, 47a-48a (invalidating this part of EPA's interpretation).

Confronted with this construction of the Act, the court of appeals, not surprisingly, found such *ad hoc* interpretation inherently tautological and unlawful:

> EPA's explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm. Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety," the formula set out by § 109(b)(1).

App. 7a.

The statutory interpretation underpinnings of the holding below are further underscored by the court of appeals' remedy – remand to the agency, the traditional remedy after an agency interpretation has been invalidated under the second prong of *Chevron*. *See City of Kansas City*, 923 F.2d at 192 ("[W]here the agency's administrator has failed to provide us with a reasonable construction to which we can defer, we must remand to the agency for consideration of the statutory question in the first instance."); *Acme Die Casting v. NLRB*, 26 F.3d 162, 166 (D.C. Cir. 1994) ("The NLRA is ambiguous, so under *Chevron* we will be bound to accept any reasonable rule that the Board selects as an appropriate gap-filling measure. But the Board must select the rule."). The rationale underlying this principle is the compelling need "to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the

administrative agency.'" *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

Although EPA takes strenuous exception to the court of appeals' selection of the remand remedy, its objection is based on the incorrect premise that the court ordered the Agency to impose "artificial[]," or extra-statutory restraints on itself. *See* Pet. 9. In actuality, the court of appeals here did no more than ask EPA to do what many other agencies have done before it – interpret a statute in conformance with constitutional principles. *See, e.g.*, App. 14a. Agencies, like courts, are bound to interpret statutes to avoid constitutional questions. This Court has thus shaped administrative exhaustion requirements precisely so that agencies, not courts, will engage many such questions in the first instance. *See Public Util. Comm'n of Cal. v. United States*, 355 U.S. 534, 539-40 (1958); *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 553 & n.22 (1954).

Nor is the fact that the Agency's interpretation was found unlawful after application of the nondelegation canon a reason to rule out categorically the traditional administrative law remedy. *See* App. 14a, 75a-76a. "[C]hoos[ing] among permissible interpretations of an ambiguous principle" is a task for the agencies, not the courts. *Id.* 75a (citing *Chevron*). Though this Court's *Benzene* decision employed a different remedy by fashioning a limiting principle on its own, that difference, far from "artificial" or "remarkable," is quite easily explained. As the D.C. Circuit noted, *Benzene* predates *Chevron*.

In sum, the court of appeals faced a recalcitrant agency that had consciously determined not to articulate a lawfully bounded or constitutionally sufficient interpretation of its authorizing act. In those circumstances, the court did precisely what a court is supposed to do under *Benzene*, *Chevron*, and most recently, *Iowa Utilities* – it rejected, not Section 109 itself, but the Agency's unlawful interpretation of Section 109. That invalidation could have been avoided, however, if EPA had

followed an "intelligible principle," including one of those that *Lead Industries* had foreclosed from consideration. *See* pp. 22-26 *infra* (discussing such principles).

2. The Statutory Interpretation Issues Presented Here Are Logically Intertwined with "Arbitrary and Capricious" Review.

There is nothing surprising about the court of appeals considering and rejecting the Agency's statutory interpretation before reaching respondents' "arbitrary and capricious" challenges. Although EPA makes extravagant claims of judicial overreaching, *see, e.g.*, Pet. 9, 16, the court was certainly within its authority in addressing statutory issues before conducting an "arbitrary and capricious" inquiry.

Statutory interpretation, including use of the nondelegation canon, is logically antecedent to "arbitrary and capricious" review. That is so because review under the "arbitrary and capricious" standard requires consideration of an agency's "applications of its statutory interpretation to the facts of the cases before it." *Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 729 (D.C. Cir. 1996). In particular, the reviewing court must interpret the statute in order to determine "whether the decision was based on a consideration of the relevant factors," and whether the agency has made "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted); *see also Sullivan v. Zebley*, 493 U.S. 521, 528-29 (1990) (reversing agency based on statute's structure, consideration of which logically precedes the issue whether agency acted arbitrarily and capriciously).

Courts therefore routinely decide questions of statutory interpretation before undertaking "arbitrary and capricious" review – even where, as here, the statutory issues raise serious constitutional concerns. *See, e.g., Edward J. DeBartolo Corp. v. Florida Constr. Bldg. & Trades Council*, 485 U.S. 568, 574-

75 (1988) (rejecting agency's interpretation on basis of constitutional avoidance); *Chamber of Commerce v. FEC*, 69 F.3d 600, 604-07 (D.C. Cir. 1995) (rejecting agency definition of statutory term on ground that it presented "serious constitutional difficulties," before noting in *dictum* that the agency's rule was arbitrary and capricious as well); *District of Columbia v. Train*, 521 F.2d 971, 981-95 (D.C. Cir. 1975) (invoking avoidance canon before addressing "arbitrary and capricious"-based challenge), *vacated on mootness grounds sub nom. EPA v. Brown*, 431 U.S. 99, *reinstated in part sub nom. District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977).

Although treating statutory issues first is both logical and conventional, ATA agrees that "arbitrary and capricious" principles are closely akin to review under *Chevron*'s second step, and that their application would provide a strong alternative basis for affirmance in this case. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741-42 (1996) (reading *Chevron* II to overlap with "arbitrary and capricious" review); *Animal Legal Defense Fund, Inc. v. Glickman*, No. 97-5009, 2000 WL 46028, at *4 (D.C. Cir. Feb. 1, 2000) (noting that *Chevron* II and "arbitrary and capricious" review "overlap at the margins") (internal quotation omitted). The relationship between statutory interpretation and "arbitrary and capricious" review is especially close where, as here, an Agency has essentially refused to identify any standard under which it would exercise its discretion. *See, e.g., Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (remanding agency determination because "[t]o refuse to define the [statutory] criteria . . . is equivalent to simply saying no without an explanation").

Accordingly, a separate D.C. Circuit panel has invalidated *a different* NAAQS rulemaking on arbitrary and capricious grounds very similar to the statutory grounds employed below. *See American Lung Ass'n v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998) ("[U]nless [the Administrator] describes the standard under which she has arrived at this conclusion, supported by a plausible explanation, we have no basis for exercising our

responsibility to determine whether her decision is arbitrary [or] capricious") (internal quotations and citation omitted), *cert. denied*, 120 S. Ct. 58 (1999). Moreover, one D.C. Circuit judge strongly hinted that he would have invalidated the agency rules here on "arbitrary and capricious" grounds. *See* App. 96a (Silberman, J., dissenting) ("I am quite uncertain whether EPA's regulatory choice meets" the "arbitrary and capricious" test). And even the strongest objector to the use of the nondelegation canon refused to declare that EPA's rules are lawful under the "arbitrary and capricious" standard. *Cf. id.* at 68a (Tatel, J., dissenting) (arguing that the panel majority's concerns "relate to whether the NAAQS are arbitrary and capricious," but not resolving that question).

Although the court below did not need to reach respondents' "arbitrary and capricious" challenge, the strength and substance of that challenge further underscores the interrelated nature of the various alternative bases for affirmance – as well as the statutory interpretation underpinnings of those theories.

B. The Court Cannot Uphold EPA's Statutory Interpretation without Considering Whether *Lead Industries* and Its Progeny Are Correct.

As explained below, the validity of *Lead Industries* needs to be addressed if the Court grants *certiorari* on any form of EPA's first question presented. *First*, the D.C. Circuit decisions are now in clear tension with this Court's constitutional and administrative law jurisprudence. *Second*, those decisions are simply wrong on several critical interpretive issues that can never produce a split in the circuits. *And finally*, consideration of these decisions is essential both to interpreting the Clean Air Act as a whole and to affording the Court a basis, if it so chooses, to avoid constitutional nondelegation issues.

1. This Court's Decisions Have Steadily Eroded the Conceptual Underpinnings of *Lead Industries* at the Same Time the D.C. Circuit Has Steadily Expanded Its Reach.

Lead Industries, read today, is a monument to the pre-*Chevron* approach to statutory construction. Confronted with a dispute over the meaning of the Act's key statutory phrase ("requisite to protect the public health"), *Lead Industries* responded by brushing aside the statutory text with the assertion that "Section 109(b) does not specify precisely what Congress had in mind." 647 F.2d at 1152. Having made short work of the text, the court proceeded to rely extensively on snippets of legislative history – to the point of virtually codifying "adverse health effects," a term that appeared in a 1970 Senate committee report, but not in the statute itself. *Id.* Largely on the basis of two passages from that report, the court rejected (1) claims that a showing of effects that are "clearly harmful" is needed before EPA may regulate on public health grounds, *id.* at 1153-54, and (2) a related claim that "the Administrator must consider the economic impact of the proposed standard . . . in determining the appropriate allowance for a margin of safety." *Id.* at 1148.

Only five days after *Lead Industries* was decided, this Court cast serious doubt on its validity by issuing its *Benzene* decision. *Benzene* turned on statutory provisions expressed aspirationally, using terms much like Section 109's "requisite to protect public health with an adequate margin of safety" standard. Under the OSH Act, the Department of Labor is directed to set toxic material standards so that "no employee will suffer material impairment of health or functional capacity," subject to the overriding provision that standards must be "reasonably necessary or appropriate to provide safe or healthful employment." OSHA Act §§ 6(b)(5), 3(8), 29 U.S.C. §§ 6(b)(5), 3(8). These provisions, like CAA § 109(b), express goals but contemplate the setting of precise numerical standards that are to be broadly enforced across the entire economy.

Benzene's principal opinion, after a painstaking review of statutory text and structure, 448 U.S. at 642-46, and after concluding that the agency's interpretation "would make such a sweeping delegation of legislative power that it might be unconstitutional," *id.* at 646 (internal quotation omitted), determined that "Congress intended, at a bare minimum, that the Secretary [of Labor] find a significant risk of harm . . . before establishing a new standard" under the relevant statute. *Id.* at 644. Only after reviewing the statute and the agency's interpretation through the lens of constitutional avoidance, did *Benzene* turn (in a separate opinion section) to look for confirming "support" in legislative history. *See id.*

The erosion of *Lead Industries* begun by *Benzene* soon picked up steam, first in *INS v. Chadha*, 462 U.S. 919 (1983), and then in *Chevron*. *Chadha* relied on the constitutional requirements of bicameralism and presentment to invalidate a "single-House" veto provision. Although seemingly unrelated, *Chadha* in fact undermines the legitimacy of the sort of near-exclusive reliance on legislative history exemplified by *Lead Industries*. If Congress may not delegate lawmaking power to itself through a single-House veto, then surely it likewise may not delegate lawmaking authority to a House or Senate Committee, much less to a bill's sponsors or to members speaking individually. *See American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 616 (1991) ("Petitioner does not – and obviously could not – contend that this statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating"); *United States v. McGoff*, 831 F.2d 1071, 1080 & n.19 (D.C. Cir. 1987) (same); *see generally* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997).

In a similar vein, while *Chevron* did announce its familiar rule of deference to agencies' statutory interpretations, it also made plain that this rule applies only to *reasonable* interpretations, and comes into play at all only if the court finds ambiguity after

deploying all the "traditional tools of statutory construction." 467 U.S. at 843 n.9, 845. A court's duty in construing Section 109 after *Chadha* and *Chevron* is therefore to do exactly what *Benzene* did: employ "traditional tools" (such as careful examination of text and structure), apply appropriate canons (including the canon of constitutional avoidance), and use legislative history judiciously and, if at all, only in a "supporting" role (not as a means of filling "a gap" in the statute, *see* 467 U.S. at 843-44).

Notwithstanding the serious doubts about its continuing validity, the D.C. Circuit has never seriously reexamined *Lead Industries*, even after *Benzene*, *Chadha*, and *Chevron*. The Circuit did, however, issue a brief treatment that reaffirmed *Lead Industries*, based on *Lead Industries*' own reasoning, in the "*Vinyl Chloride*" case. *See NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*).

Vinyl Chloride, however, only continues *Lead Industries*' erosion. The statute at issue in *Vinyl Chloride*, former Clean Air Act Section 112 (b)(1)(B), directed EPA to set hazardous air pollutant standards "at the level which in the [Administrator's] judgment provides an *ample* margin of safety to protect public health." CAA § 112(b)(1)(B), 42 U.S.C. § 7412(b)(1)(B) (1982) (emphasis added). While conceding that the term "ample" implied a greater degree of health protection than the parallel term "adequate" in Section 109(b), *Vinyl Chloride* nonetheless relied on *Benzene* to find that the presence of a "significant risk" was a precondition to regulation. 824 F. 2d at 1153. In addition, the court went on to hold that Section 112 did not preclude EPA from considering non-health factors under a *Chevron* step one analysis and authorized EPA to consider compliance costs and related matters in setting the statutory "ample margin of safety." *Id.* at 1158, 1163-66. The fact that *Vinyl Chloride* reached conclusions opposite to *Lead Industries* on these key issues – especially in context of the more health-protective "ample margin of safety" formulation – strongly

suggests that even the D.C. Circuit itself now lacks confidence in *Lead Industries*' reasoning.

Even so, the D.C. Circuit has steadily extended *Lead Industries* precedential reach. *Lead Industries* directly addressed (and rejected) only the argument that cost had to be used in establishing "margins of safety" under Section 109, plus the argument that the Agency was required to show "clear" health effects before regulating to protect "public health." But under later decisions, *Lead Industries* has been read to preclude consideration of all factors of "cost and technology feasibility," *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981) – and even indirect health effects like "costs associated with alleged health risks from unemployment" caused by more stringent air quality standards. *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *vacated in part*, 921 F.2d 326 (D.C. Cir.), *cert. dismissed sub nom. Alabama Power Co. v. NRDC*, 498 U.S. 1075 (1991). In fact, *Lead Industries* is so entrenched that the court below declined to address arguments that EPA's revised ozone standards reflect unsound "public health policy" because they would disrupt on-going, long-term, air-quality improvement efforts by the States. Ozone Br. of Non-State Clean Air Act Petitioners at 23.

2. *Lead Industries* Was Wrongly Decided.

Whenever this Court comes to review *Lead Industries*, it will find that the D.C. Circuit incorrectly decided issues of far-reaching economic and social consequence – issues that have been long delayed in reaching the Court because the D.C. Circuit's status as sole venue for reviewing NAAQS standard-setting, *see* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1), ensures such issues can never gain the Court's attention by way of a circuit split.

By quickly brushing aside the statutory text, *Lead Industries* overlooked important indicia of Congressional intent that emerge from a careful reading of the statute. The essential text of Section 109(b) is as follows:

> National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.

CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1); *see also* CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). The term "criteria" here is an important cross-reference to an informational document that the Act's Section 108(a)(2) directs EPA's Administrator to develop:

> Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.

CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). Section 108 then goes on to lay out, in its subparagraphs (A), (B), and (C), three specific types of material that an air-quality criteria informational document "*shall*" – "to the extent practicable" – "*include*:" (A) "variable factors" which may alter the effects of the pollutant on "public heath or welfare;" (B) other "air pollutants" that "may interact" with the pollutant under study in the atmosphere "to produce an adverse effect on public health or welfare;" and (C) "any known or anticipated adverse effects on welfare." *Id.*

As demonstrated below, this statutory framework does not support the court of appeals' conclusions that "Congress has directly spoken to the precise question," *Chevron*, 467 U.S. at 842, of whether EPA is "*permitted* to consider the cost of implementing" air-quality standards, App. 19a (emphasis added), and responded with a negative answer. *Id.* While allegiance to circuit precedent is understandable, the court below should have recognized that *Lead Industries* is now in

significant conflict not only with this Court's precedents, including its interpretation of a similarly open-ended statute in *Benzene*, but also with the D.C. Circuit's own decisions, including its interpretation of a parallel text in *Vinyl Chloride*.

Even more problematic, however, *Lead Industries* was not at all persuasive when decided. In particular, *Lead Industries'* detours through legislative history resulted in shunting its principal discussion of statutory text and structure into a single footnote buried in the middle of the opinion – footnote 37. That footnote contains the whole of the two textual arguments identified as most important when *Lead Industries* was distinguished by the D.C. Circuit's *en banc* decision in *Vinyl Chloride*. 824 F.2d at 1159. The critical footnote begins by baldly asserting that the Administrator is not "allowed" to consider costs because Section 108(a)(2) "outlines *the criteria* on which air quality standards are to be based" and "makes no mention of such factors." *Lead Industries*, 647 F.2d at 1149 n.37 (emphasis added).

But that assertion is based on an obvious solecism – the court's failure to read the key statutory term ("criteria") in context. To be sure, outside the Clean Air Act, "criteria" can indeed refer to a standard on which "a decision may be based." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY at 307 (9th ed. 1987). But in the Section 108 context, "criteria" refers quite precisely to, not decisional standards, but an extensive informational compilation that the Act requires EPA to use in NAAQS standard setting – a compilation that the Agency itself usually refers to in capital letters as a "Criteria *Document*." *See, e.g.*, 62 Fed Reg. at 38,654 (PM rule); 62 Fed. Reg. at 38,857 (Ozone rule).

Once "criteria" is understood to mean a "criteria document," *Lead Industries'* misreading of Section 108 is apparent. Section 108 does specify certain information that criteria documents must *include* (but not be limited to) – the information listed in subparagraphs 108(a)(2)(A), (B), and (C). But that specification was never intended to be a listing of decisionmaking "factors,"

much less an exclusive one. In fact, subparagraphs (A), (B), and (C) quite evidently were added, not because of the importance of the listed information, but because consideration of the secondary matters of "variable factors," cross-pollutant interactions, and "welfare effects" might otherwise be overlooked entirely.

Lead Industries should have realized that (1) "criteria" refers to a *document*; (2) the statute's enumeration refers to information that must be compiled, not factors for decisionmaking; (3) this enumeration is mandatory, but not exclusive; and (4) to the extent Section 108 spells out informational requirements at all, it does so precisely because the information identified is of secondary importance. But in fact *Lead Industries* failed to grasp any of these points on its way to precluding EPA's consideration of costs and attainability.

Lead Industries's second footnote 37 argument, which *Vinyl Chloride* also emphasizes, fares no better. That argument consists entirely of a recitation of the following: States may consider "economic and technological feasibility in selecting the mix of [pollution] control devices;" they may do so "only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards;" and the EPA Administrator "may not consider" such factors in reviewing and approving these State plans. 647 F.2d at 1149 n.37. But these observations, while true, do not remotely prove *Lead Industries'* point. They show, rather, that the economic decisions taken by both EPA *and* States are *binding*. That is, States may not second-guess economic and pragmatic decisions that EPA makes in setting standards by declaring those standards infeasible, or extending "the strict deadlines for attainment of the standards." EPA likewise "may not consider," much less second-guess, a State's economic or pragmatic decisions by reviewing implementation plans on the basis of cost or cost-benefit considerations.

But neither of these points logically implies that EPA itself cannot consider economic or pragmatic factors in setting NAAQS. Indeed, given that States may not second-guess EPA's decisions, if non-health factors are *ever* to be given their proper role, they *must* be considered at the outset, in standard-setting. As demonstrated above, there is plainly nothing to preclude such consideration in view of the Act's text, the constitutional avoidance principles relied on in *Benzene*, and the textual analysis of parallel provisions in *Vinyl Chloride*.

3. This Court Should Address the Statutory Interpretation Issues Presented Here in Order to Increase the Likelihood of Avoiding Constitutional Issues.

The court of appeals could hardly have been more clear that permitting consideration of non-health factors in setting NAAQS would have helped to establish the "intelligible principle" needed to cabin EPA's discretion and permit meaningful judicial review. *See* App. 14a-15a, 74a-76a. This Court, if it grants *certiorari* on any form of the first question presented by EPA, should accordingly take care that it does not artificially (or accidentally) predetermine what it can and cannot consider in construing the Act. This suggestion is respectfully offered in order to enable the parties to frame the issues in the most helpful manner possible and to enable the Court, if it chooses, to resolve the case on a variety of non-constitutional grounds. To that end, ATA sketches the following arguments that, among others, ATA will likely present should *certiorari* be granted.

1. Permitting Consideration of Economic and Pragmatic Factors. The Act's standard-setting provisions say nothing on their face directing the absolute exclusion of indirect health effects, costs, and related considerations. Section 109(b)(1) says instead that EPA shall issue standards that are "requisite to protect the public health." That text does not contain a categorical directive even remotely comparable to those contained in statutes like the celebrated Delaney Clause. *See* 21

U.S.C. § 348(c)(3)(A) ("[N]o additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal."); *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987) (Williams, J.). By its terms, the key text of Section 109(b) rules in consideration of "public health," but fails to *rule out* consideration of anything.

Section 109 does include text, emphasized in *Lead Industries*, that says that air-quality standards shall be "based on" the Section 108 "criteria" document. But here again, the language Congress used is neither categorical nor exclusive. To the contrary, the Act elsewhere directs that EPA consider other informational sources too, including recommendations by a seven-member Scientific Review Committee, CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3), and "written comments, data, or documentary information" submitted by the public, CAA § 307(d)(4)(B)(i), 42 U.S.C. § 7607(d)(4)(B)(i). *Cf. Chevron*, 467 U.S. at 863 (at step two, courts must consider whether agency's "reasoning is supported by the public record developed in the rulemaking process").

That these other sources of information are to be considered *and acted upon* every bit as much as the information in criteria documents is clear from the requirement that EPA must respond to significant public "comments, criticism, and new data," CAA § 307(d)(6)(B), 42 U.S.C. § 7607(d)(6)(B), and offer "an explanation of the reasons" for departures from Scientific Advisory Committee recommendations. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3). EPA must therefore "base" its decisionmaking on the criteria information, but, as the statute repeatedly underscores, not *only* on the criteria information. Moreover, the absence of any express textual limits on what EPA can consider is supported (rather than undermined, as *Lead Industries* assumed) by the legislative history. That history memorializes the expectation of many members of Congress that "economic and social consequences" would indeed play a significant role in NAAQS standard setting. *See* H.R. Rep. No. 95-564 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1502.

An additional confirmation that the Act anticipates a significant role for non-health factors is found in the otherwise inexplicable directive that EPA must issue – "simultaneously" with the criteria document and *before* EPA opens a NAAQS rulemaking – "information" on the "cost" of "air pollution control techniques." CAA § 108(b)(1), 42 U.S.C. § 7408(b)(1). The self-evident purpose of that requirement is to equip the States with the information necessary to critique effectively EPA's cost and attainability assessments in the NAAQS rulemaking proceedings. *Cf.* CAA § 307(d)(6)(B), 42 U.S.C. § 7607(d)(6)(B) (EPA required to "respond to significant" public "comments, criticism, *and new data*") (emphasis added). The requirement that this cost information be provided *before* the rulemaking begins would serve no purpose if in the standard-setting rulemaking itself EPA were permitted to ignore costs altogether.

But the final confirmation that EPA may, and indeed should, consider costs, is the fact that EPA now *does* consider costs, albeit in back-door fashion. Even while the Agency was giving lip-service to *Lead Industries*, EPA issued, simultaneously with its final ozone and PM rules, a "soft" $10,000 (per ton of emissions reductions) compliance-cost cap. 62 Fed. Reg. 38,421, 38,429 (July 18, 1997). Given this suggestive fact, and the role that pragmatic factors play in any rational decisionmaking process, this Court should now consider whether *Lead Industries*, as implemented by EPA, is partially fiction – and, if so, whether such a fiction serves mainly to impede reasonable standard-setting, encourage covert decisonmaking, and defeat effective review.

2. Requiring Significant Risk as a Precondition to Imposing New Measures to Protect Public Health. Wholly apart from any role that costs might play, Section 109's "requisite to protect the public health" test surely means that EPA can issue new or tightened standards only upon a showing that there is a "significant risk" to public health under the existing standards. Unlike its cognate statutory term, "the public welfare," the term

"public health" is left undefined by the Act. *Compare* CAA § 302(h), 42 U.S.C. § 7602(h) (defining "welfare"). This suggests that Congress expected that the latter term would take meaning from regulatory context and background legal principles. In fact, "Public Health Law" was a well-established field when Section 109 was added to the Act in 1970. Practiced mainly through local health boards, its principal objective has never been to achieve complete safety, much less "esthetic" enjoyment. Rather, the term "public health" has connoted the practical but "preventive" goal of eliminating unacceptable public health risks. *See* Frank P. Grad, PUBLIC HEALTH LAW MANUAL at 8-9 (1965).

That Congress expected EPA to regulate only "significant risks" to "public health" is strongly supported by the *Benzene* decision, not to mention this Court's analysis of "passive restraints" in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 51-59 (1983), and many lower court decisions. *See e.g., Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991); *Hess & Clark v. FDA*, 495 F.2d 975, 994 (D.C. Cir. 1974) (Leventhal, J); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 636-41 (D.C. Cir. 1973) (Leventhal, J).

EPA pretends to understand this point when it awkwardly conjoins a form of *Benzene*'s "significant risk" test with *Lead Industries*' regrettable misuse of the 1970 Senate report. EPA thus claims that the legislative report "indicates that the health effects justifying a NAAQS must be 'adverse' and therefore must be *medically significant* and not merely detectable." Pet. 15 (emphasis added). But that formulation only clouds the analysis that must be performed in any scientifically defensible determination of "significant risk." *See Building & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1264-67 (D.C. Cir. 1988). Importantly, EPA argued vigorously below that the *Benzene* "'significant risk of harm'" test is inapposite because "a 'test' under which the Administrator must first make a 'finding' that the existing standard permits a 'significant risk of

harm' to public health, and then demonstrate that the revised standard is 'needed to improve demonstrably the overall public health,'" would be "plainly inconsistent" with the text of the Act, and precluded by *Lead Industries*. EPA Ozone Br. 42 & n.40. This Court should accordingly take care not to conflate an illegitimately grounded concept of "medically significant" "health effects" espoused by EPA with something quite different – the term "significant risk" as used by this and other courts.

3. Requiring Consideration of Costs in Setting the Safety Margin. The Act contains an additional limitation that applies with respect to Section 109(b)(1)'s directive that the Administrator establish an "*adequate* margin of safety." The D.C. Circuit noted in *Vinyl Chloride* that "margin of safety" is derived from an engineering term meaning "a safety factor . . . meant to compensate for uncertainties and variabilities." 824 F.2d at 1152 (internal quotation omitted). Because no product has ever been engineered for complete safety, however, this derivation reconfirms the *Benzene* pronouncement that "safe" is not the equivalent of "risk free." Moreover, it suggests that Section 109 safety margins must trade off the costs and benefits of additional safety, just as designers strive to engineer "adequate" – but never complete – safety into every product they design. *Cf.* Karl T. Ulrich and Steven D. Eppinger, PRODUCT DESIGN AND DEVELOPMENT at 5 (2d ed. 1997) (managing "tradeoffs in a way that maximizes success" listed as the first "challenge" of product engineering). Tellingly, even the D.C. Circuit has acknowledged that costs *may* be used for setting safety margins in the context of former Section 112 of the Act – a provision that, as discussed above, is the close textual sibling to Section 109. *See Vinyl Chloride*, 824 F.2d at1157, 1165.

C. This Court Should Grant or Hold this Cross-Petition to Ensure that the Full Range of Statutory Interpretation Issues Is Properly Presented.

ATA recognizes that this conditional cross-petition very likely is not required. In particular, even a cursory look to EPA's first question reveals that it refers to EPA's "interpret[ation]" of the statute, *see* Pet. (i), which must necessarily include inquiry into any and all ways that the Act may be properly construed. Given how the Government itself has framed its first question, a cross-petition specifically raising statutory issues, such as overruling *Lead Industries*, appears unnecessary. *See* pp. 18-22, above; *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2127 (1999) (issue "intimately bound up" with primary question properly before the Court); *Missouri v. Jenkins*, 515 U.S. 70, 84-85 (1995) (issue "necessary for a proper determination of" primary question properly before the Court).

Likewise, alternative grounds for affirmance will be argued should *certiorari* be granted – alternative grounds arising not only from *Lead Industries* and other interpretive issues under the Act, but also from "arbitrary and capricious" review. Like the disposition below, those grounds would require a remand for new EPA proceedings. Accordingly, under this Court's familiar rule, no cross-petition should be needed: "A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to *preserve, and not to change, the judgment*." *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999) (emphasis added; internal quotation omitted); *accord United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924); Robert L. Stern *et al.*, SUPREME COURT PRACTICE § 6.35 at 363 (7th ed. 1993).

ATA nonetheless files this conditional cross-petition for two reasons. *First*, EPA has sometimes appeared to characterize the court of appeals' holding as an attack on the constitutionality of *Section 109 itself*, as opposed to an invalidation of *EPA's*

interpretation of Section 109. *See* pp. 7-8 above. Against this backdrop, a bold advocate might be tempted to read EPA's question so narrowly as to exclude the full set of statutory interpretation issues. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992) (construing question presented in light of argument advanced in petition).

Second, this Court's cross-petition jurisprudence does not directly resolve the question whether a cross-petition is required in the unusual circumstances presented here. Ordinarily, the court of appeals would have affirmed or reversed a district court judgment, and the effect of the court's rulings on the rights of the parties would be clear. Here, however, the court of appeals (1) undertook direct review of an agency rulemaking; and (2) did not make a binary, up-or-down determination on the validity of the NAAQS. Rather, the court "remand[ed] the cases to EPA for further consideration of all standards at issue" *without vacating the NAAQS*. App. 57a. The court's judgment is thus, out of deference to the Agency, deliberately vague: it leaves to EPA the tasks of developing a method for assessing in the first instance how to abide by the decision while remand proceedings are in progress.

In these circumstances, there can be no absolute certainty about how this Court's already somewhat flexible cross-petition jurisprudence might apply. *See* SUPREME COURT PRACTICE, § 6.35 at 366-68. In particular, overruling *Lead Industries* would not change the *form of the judgment*, because these cases would still be remanded for further consideration. On the other hand, the *substance of the remand* could be somewhat different compared to, say, affirming the D.C. Circuit's reasoning or remanding on "arbitrary and capricious" grounds. That is, if *Lead Industries* were overruled, EPA would be newly empowered to consider non-health factors, or engage in a "significant risk" inquiry, or apply some other principle identified by the Court.

Moreover, it is not possible to say categorically whether or not such a change would enlarge the respondents' rights – the traditional trigger for the need to file a cross-petition. *See, e.g., Andrus v. Idaho*, 445 U.S. 715, 725 n.6 (1980). Any judgment on this score is further complicated by the fact that EPA is required by statute to undertake lengthy NAAQS rulemakings every five years. *See* CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). Accordingly, "remand" proceedings easily elide into entirely different "rulemakings," with the result that the practical effect of any given court decision becomes harder to discern.

ATA submits that a cross-petition could conceivably be required, but only where acceptance of an alternative theory offered to support the judgment would change either the range of substantive outcomes *available to*, or the procedural steps *required of*, the agency on remand. That test is clearly preferable to a rule that requires a cross-petition whenever the agency's action on remand would be affected by a change in rationale, for such a rule would require cross-petitions wherever the *reasoning* of this Court might differ from that of the court of appeals. This latter rule would be directly at odds with this Court's frequent pronouncements that a respondent may launch "an attack upon the reasoning of the lower court" without filing a cross-petition. *American Ry. Express* Co., 265 U.S. at 435; SUPREME COURT PRACTICE, § 6.35 at 363.

At least in the ozone and coarse PM rulemakings, even rejecting *Lead Industries* outright would not enlarge the substantive results EPA would be permitted to reach, nor require additional procedural steps. As to the ozone standard, EPA must in any event undertake a full-blown reconsideration of the record so that it can determine whether a revision can be justified in light of ozone's *net* effect on public health. *See* Opp. pp. 16-17. Likewise, the coarse PM standard will have to be reconsidered from the ground up as EPA reexamines its definition of a "coarse" particle. *See* App. 49a-53a. Fine PM might arguably present a different situation, because there

EPA's failure to abide by an "intelligible principle" provided the sole basis for remand. But this distinction appears wholly technical, given that EPA already has begun another statutorily-required round of review – proceedings that are just as extensive as the ones required as a matter of law for ozone and coarse PM. In sum, even assuming that the rule were as stated above, cross-petitions still clearly should not be required for the ozone and coarse particulate matter rulemakings, and perhaps not for the fine PM rulemaking as well.

CONCLUSION

For the foregoing reasons, this Court should either grant or hold this conditional cross-petition in the event that the Court grants *certiorari* on any form of the first question presented in EPA's petition.

Respectfully submitted,

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APPENDIX

CAA § 108, 42 U.S.C. § 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant –

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on –

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

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CAA § 109, 42 U.S.C. § 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator –

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

****

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

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(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

CAA § 307, 42 U.S.C. § 7607. Administrative proceedings and judicial review

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(d) Rulemaking

(1) This subsection applies to –

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

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(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall

specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of –

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

****

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information . . . .

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

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Nos. 99-1257, 99-1263, 99-1265, 99-1426, 99-1431, 99-1442

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF OF STATE RESPONDENTS IN SUPPORT OF ATA AND CAA INDUSTRY'S CONDITIONAL CROSS-PETITIONS

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting national air quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

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Appalachian Power Company, et al. and American Trucking Associations, Inc., et al. ("CAA Industry and ATA conditional cross-petitioners" or "conditional cross-petitioners") have submitted Conditional Cross-Petitions in this case, which arises from petitions for writ of certiorari to review *American Trucking Associations, Inc. v. U.S. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). The Conditional Cross-Petitions concern the scope of authority of the United States Environmental Protection Agency ("EPA" or "the Agency") to promulgate or revise a National Ambient Air Quality Standard ("NAAQS" or "standard") under the Clean Air Act ("CAA" or "the Act"). At issue in EPA's petition is whether the Act as construed by EPA creates an excessive delegation of rulemaking authority. The conditional cross-petitioners argue that, if the Court grants review to consider the delegation issue, the Court should also review the related question whether the statute has been properly construed to prevent EPA from considering the costs, as well as the benefits, of regulation.

Respondent States of Michigan and West Virginia oppose question one, and all three Respondent States oppose questions two and three of EPA's petition for certiorari. *See*, Respondent States' Brief in Opposition to Petitions for Certiorari. At the same time, however, Respondent States agree with conditional cross-petitioners' Conditional Cross-Petitions, urging this Court, if it grants certiorari on any of these questions, to also grant certiorari on the issue of whether EPA is authorized to consider factors other than health in setting or revising a standard under Section 109(b) of the Clean Air Act, 42 U.S.C. 7409(b); EPA App. 111a. [1]

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[1] Respondent States of Ohio, Michigan and West Virginia do not support the cross-petition of Citizens for Balanced Transport.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITIONS

The Clean Air Act provides that the only mechanism for review of ambient air standards is to petition in the District of Columbia Circuit. CAA §307(b)(1); 42 U.S.C. 7607(b)(1). Review by this Court is, therefore, the only procedure by which to correct a long-standing erroneous decision by the District of Columbia Circuit on EPA's consideration of costs in setting ambient standards under the Clean Air Act. In addition, a correct interpretation of EPA's authority under the Act will avoid altogether the need to reach the nondelegation issue in the first question presented of EPA's petition.

The case below represents the latest in a line of cases from the D.C. Circuit, following *Lead Industries Ass'n. v. U.S. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)("*Lead Industries*"), and holding that the EPA is bereft of discretion to consider the social, economic and environmental costs of, as well as the public health benefits of, a standard under Section 109. *Lead Industries* was wrongly decided, primarily because the language of Section 109 and related sections indicates that EPA has the authority to consider factors other than health when setting an air standard. Under Section 109, "ambient air quality standards" are set, "the attainment and maintenance of which in the judgment of the Administrator, based on such *criteria* and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b)(1); EPA App. 111a (emphasis supplied). The word "criteria" refers to Section 108; Section 108(a) includes a non-exclusive list of factors for setting criteria, and Section 108(b) requires EPA to collect information on cost and technological feasibility simultaneously with establishing a standard. In addition, Congress's direction in Section 109(d)(1) that EPA revise standards "as may be appropriate" in accordance with

Section 109(b) and Section 108, gives EPA discretion to consider factors such as costs. Finally, Section 109(d)(2)(c) requires an "independent scientific review committee" to advise the Administrator of any "adverse public health, welfare, social, economic or energy effects" that may result from revision of a standard. *Lead Industries* and its progeny were, therefore, wrongly decided.

In fact, the *Lead Industries* line of cases, including the case below, seemingly contradicts other cases from the District of Columbia Circuit interpreting other, similar provisions of the Act, as well as other administrative decisions. *See Michigan Department of Environmental Quality v. U.S. EPA*, 2000 U.S. App. LEXIS 3209 (D.C. Cir. 2000) ("*NOx SIP call*"); *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"). This Court can correct that conflict.

But perhaps most important to the Respondent States, this Court must overrule the D.C. Circuit's erroneous holding because its (and EPA's) interpretation of Section 109 potentially puts the States into an impossible box. Sections 108 and 110 of the Act, under recent D.C. Circuit decisions, *require* the States to consider economic and technological feasibility when implementing a standard for non-threshold pollutants, but the lower court's interpretation of Section 109 in this case *precludes* EPA from doing so. 175 F.3d at 1041; EPA App. 20a-21a. This interpretation creates a potential impasse between EPA and the States in implementing an air standard. The EPA, armed with complete discretion over a non-threshold pollutant and unable to consider economic or technological feasibility, could set a standard that its own data might demonstrate is realistically impossible for the States to achieve when cost and available technology are considered.

In order to resolve this impasse, if the Court grants certiorari in one or more of the petitions submitted in this case, it should also grant certiorari to the Conditional Cross-Petitions of the CAA Industry and ATA conditional cross-petitioners. In addition, the proper interpretation of Section 109 will preclude consideration of the delegation issue.

A. The Court Should Avoid Consideration Of The Non-Delegation Issue By Resolving The Statutory Cost-Benefit Issue.

As this Court has made clear on numerous occasions, it is the "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring). This case presents just such a situation. As demonstrated below, if the Court grants certiorari on the first question presented in EPA's petition, it should resolve the case by granting and resolving the issue presented in the Conditional Cross-Petitions, and avoiding the constitutional nondelegation issue presented by EPA.

The lower court correctly found that EPA has failed to find an "intelligible principle" for selecting a standard for ozone.[2] 175 F.3d at 1034; EPA App. 5a. It therefore correctly remanded the revised standard to the EPA "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038; EPA App. 14a. However, in

[2] The Respondent States focus here on the ozone standard. However, most of the statements made for ozone apply equally to the standard for coarse and fine particulate matter ($PM_{2.5}$ and PM_{10}). *See, e.g.*, 62 *Fed. Reg.* at 38,688 (July 18, 1997) (PM); 62 *Fed. Reg.* at 38,883 (July 18, 1997) (ozone); Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 237, *OAQPS Staff Paper*, PMJA 2068.

so doing, it was constrained by *Lead Industries* to deny EPA the one tool that would most help the Agency in selecting an ozone standard: cost-benefit analysis.

Ozone is a "non-threshold" pollutant; that is, there is no threshold amount, above which deleterious health effects are certain, and below which no or few health effects are known. As the lower court stated, "EPA regards ozone definitely, and PM likely, as non-threshold pollutants, i.e. ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." 175 F.3d at 1034 (EPA App. 5a), citing Ozone Final Rule, 62 *Fed. Reg.* at 38,863/3 (July 18, 1997). *See also Vinyl Chloride*, 824 F.2d at 1148 (a "non-threshold" pollutant is one which "appears to create a risk to health at all non-zero levels of emission"). *Cf. Lead Industries*, 647 F.2d at 1137-41 (discussing various thresholds for lead exposure used to support the air standard for lead). The court below also noted that "the only concentration for ozone . . . that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F.3d at 1034; EPA App. 6a.

In the absence of a health threshold for a pollutant, it is not surprising that EPA has difficulty articulating an "intelligible principle" based on health alone for its ozone standard, as *any* presence of the pollutant presents some threat to health. As the lower court stated, all the relevant variables related to health with regard to ozone "seem to range continuously from high to low." 175 F.3d at 1039; EPA App. 16a. Despite this acknowledgment, the lower court insists that EPA should be able to develop some health-based principle by which a standard can be developed. 175 F.3d at 1039; EPA App. 16a. And, also despite this acknowledgment, the lower court insists on its interpretation of Section 109(b), first articulated in *Lead Industries*, that EPA is barred from considering any factor other than health. 175 F.3d at 1038; EPA App. 14a-15a.

Ironically, the model suggested by the D.C. Circuit for EPA's use in "building blocks for a principled structure" is the Oregon plan for health care for the poor. This plan involves a ranking of treatments by a measure of the amount of improvement in health *divided by the cost of the treatment.* 175 F.3d at 1039; EPA App. 16a-17a. In other words, the principal model suggested by the lower court for EPA to follow in developing an "intelligible principle" for the ozone standard is itself a cost-benefit analysis.

Another alternative suggested by the lower court is for EPA to "report to Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice." *Id.*; EPA App. 18a. And indeed, if *Lead Industries* is correct, returning to Congress may be EPA's only legal alternative.

The interpretation of Section 109(b) of the Act suggested by EPA and supported by the lower court logically requires only one of two equally untenable results. The first is that EPA has no discretion and must set the standard for a non-threshold pollutant at zero. The second is that because no factor other than direct health effects can be considered, EPA has complete discretion to select any standard for a non-threshold pollutant. 175 F.3d at 1038; EPA App. 14a.

The first possible result of the lower court's interpretation of Section 109 for a non-threshold pollutant is both untenable and inconsistent with Congress's intent. If health is truly the only factor to be considered, then the only way to prevent any risk of direct adverse health effects is to set the standard at zero. "Thus the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F. 3d at 1034; EPA App. 5a.

Of course, consideration of health as a criterion does not necessarily mean that the concentration chosen should be "utterly risk free." But "for EPA to pick any non-zero level it must explain the degree of imperfection permitted." 175 F.3d at 1034; EPA App. 6a. All of EPA's stated criteria are vague references to "the nature and severity" of health effects, "the size of the sensitive populations at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35; EPA App. 6a-7a, citing Ozone Final Rule, 62 *Fed. Reg.* at 38,883/2.

Aside from their vagueness, these factors do not provide a principled method for drawing a line identifying a level of air quality that is "requisite" to protect the "public health." How many deaths or adverse affects in the "sensitive population" is EPA willing to tolerate in the name of "public health"? How severe must a "health effect" be for EPA to consider it in setting a NAAQS designed to protect the "public health"? If direct health risks alone are to be considered, there simply is no principled way to draw a line, below which the effects are acceptable from a "public health" standpoint, and above which they are not. As a consequence, if factors other than direct health effects may not be considered, it is impossible to articulate or discern an intelligible principle for establishing a standard, at any level other than zero, for a non-threshold pollutant.

EPA's NAAQS determinations, as with all agency determinations, are subject to judicial review under the standard articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). CAA §307(b)(1), (d)(1), (s); 42 U.S.C. 7607(b)(1), (d)(1), (s); EPA App. 120a-21a. Under a non-zero-risk regime with direct health risk as the only criterion, EPA must pull a number out of thin air in setting a standard for ozone. As there is complete discretion in setting a standard under this theory, it is impossible for EPA to commit an abuse of discretion. This renders the standard

essentially unreviewable by the courts. Although the *Chevron* analysis is deferential to administrative agencies, it does not allow the agency complete and unreviewable discretion in its interpretation of acts of Congress.

The dilemma produced by *Lead Industries* and EPA's standardless assertion of authority is what led the D.C. Circuit to invoke the nondelegation doctrine. As the ATA conditional cross-petitioners pointed out, the D.C. Circuit was bound by the *Lead Industries* precedent to preclude EPA's consideration of cost under Section 109, and the only alternative is permitting EPA a boundless (and therefore unconstitutional) discretion. This Court is not bound by *Lead Industries*, and can resolve the case without reaching the nondelegation doctrine, by construing Section 109 to permit consideration of other factors.

B. This Court Should Resolve The Impasse Created For EPA And The States By The District of Columbia Circuit's Holding That EPA Cannot Consider Costs When Setting A NAAQS.

The lower court's decision also places the States in a potentially impossible position. Under the Act, after EPA sets a standard for a particular pollutant, each State is required to develop a state implementation plan ("SIP") for that pollutant. CAA §110; 42 U.S.C. 7410. Indeed, the State is primarily responsible for enforcing a standard. CAA §107; 42 U.S.C. 7407. EPA is required to gather and issue to the States:

> information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology.

CAA §108(b); 42 U.S.C. 7408(b). In other words, EPA is to gather and provide data to the States on the economic and technological costs of implementing the standard. The lower court has held that this provision of Section 108 does not require or allow EPA to consider costs and benefits in setting a standard. 175 F.3d at 1041; EPA App. 20a.

If this interpretation is correct, then EPA is free to set the standard for a particular pollutant without considering its cost and EPA could set a standard that in practical terms, is impossible to implement because of its costs. The States would be left "holding the bag": required to attain the standard by a specific deadline through their implementation plans, while considering costs of implementation, but faced with an arbitrarily-set and non-cost-effective standard.

This Court's review is necessary to alleviate the potential for the States to be placed in an untenable position under this regime--a regime that forces States to impose controls to abate theoretical health risks without promoting the "public health" of its population.

C. This Court Should Reconcile The Conflicting Holdings By The District Of Columbia Circuit Regarding An Administrative Agency's Authority To Consider Factors Not Mentioned Explicitly In The Enabling Legislation.

Under Section 109(b) of the Act, the EPA is to set air standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b). Once a standard is set, the EPA must review it periodically, and revise it as appropriate under Sections 108 and 109(b).

The D.C. Circuit first considered the scope of EPA's authority with regard to the language of Section 109(b) in *Lead Industries*. In *Lead Industries*, the court reviewed the contention by petitioners in that case that the EPA was *required* by the language of the statute to consider economic and technological feasibility in setting air quality standards for lead. 647 F.2d 1148. However, the court went beyond what was necessary to decide that issue, and held that not only was EPA not *required* to consider economic and technological factors, but that it was *precluded* from doing so. 647 F.2d 1148.

The erroneous dictum has been cited on several occasions since *Lead Industries*, and indeed expanded since *Lead Industries*, to preclude EPA from using a number of factors in determining a standard. For instance, the D.C. Circuit held that in setting the standard for particulate matter, the EPA was precluded from considering the health consequences of unemployment. *National Resources Defense Council v. U.S. EPA*, 902 F.2d 962, 972-73 (D.C. Cir. 1990). In addition, the D.C. Circuit held that EPA could not consider attainability and cost justifications for ozone standards. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1184-85 (D.C. Cir. 1981). And in dicta, the D.C. Circuit stated that §109 does "not allow consideration of technological or economic feasibility." *Vinyl Chloride*, 824 F.2d at 1158-59.

The *Lead Industries* rationale was that where Congress did not expressly and specifically provide for consideration of cost or other factors, an agency was forbidden from considering it. 647 F.2d at 1148. To be sure, the courts have correctly held that where statutory language articulates the factors relevant to an agency's decision, the agency may not base its decision on other, irrelevant factors. For example, in *Union Electric Co. v. U.S. EPA*, 427 U.S. 246 (1976), the Court found that a provision enumerating

eight criteria for consideration did not authorize consideration of other criteria. *Id.* at 257. Similarly, in *American Petroleum Institute v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995), the lower court struck down EPA's decision to include the goal of ethanol market protection in its promulgation of regulations under Section 211 of the Clean Air Act, 42 U.S.C. 7545, a goal that could "possibly make air quality worse." According to the court, considering this goal as the basis for the regulation did not square with the statutory mandate to adopt performance standards that reduce pollution. And in *Ethyl Corp. v. U.S. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), the D.C. Circuit held that EPA's decision to deny a waiver based on health considerations (rather than the statutorily-required criterion of whether an additive caused or contributed to the failure of an emission control device) was impermissible. *See also NOx SIP call*, 2000 U.S. App. LEXIS 3209, *93 (Sentelle, J., dissenting).

In contrast, broad statutory language directing EPA to adopt rules that protect the "public health" with an "adequate margin of safety," and directing EPA to revise standards as may be "appropriate," does not preclude consideration of any factor. Thus, another line of D.C. Circuit cases holds that an agency can consider costs if not expressly precluded from doing so by statutory language. For instance, in *Vinyl Chloride*, 824 F.2d at 1155, 1163, the D.C. Circuit held that Section 112, 42 U.S.C. 7412, which requires EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the public health, did not preclude a consideration of costs. And in *George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 622-23 (D.C. Cir. 1998), the D.C. Circuit allowed EPA to consider the effects of a proposed rule on the price and supply of gasoline because there was nothing in the text or structure of the statute to preclude it. In *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), the FAA was permitted to consider costs in its plan for

"substantial restoration of the natural quiet," even though costs were not mentioned in the statute. And in *National Resources Defense Council v. U.S. EPA*, 937 F.2d 641, 645 (D.C. Cir. 1991), the D.C. Circuit allowed EPA to use a cost-benefit analysis in determining whether fugitive dust from coal mines should count in identifying "major" contributors to "significant deterioration" under Sections 160 *et seq.*, despite the lack of statutory language mentioning costs. As the D.C. Circuit observed only this month in *NOx SIP call*, 2000 U.S. App. LEXIS 3209 at *36-40, "[t]hese cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction."[3]

Therefore, in contradiction to the rationale in the *Lead Industries* line of cases, the rationale in *Vinyl Chloride* and similar cases is that where Congress does not enact statutory language that precludes it, and where Congress in fact enacts statutory language (*e.g.*, "ample margin of safety") that opens the door to cost considerations, an administrative agency can consider cost. And where an agency is confronted with cost arguments, and it has discretion to consider them, it cannot lawfully ignore them. Indeed, there is no principled reason why Section 109(b) cannot be analyzed under *Vinyl Chloride* and similar cases, rather than under the erroneous *Lead Industries* test. Several of the cited cases involve similar statutory structures: "a mandate directed to some environmental benefit," "phrased in general quantitative terms," "and contain[ing] not a word alluding to non-health trade-offs." Section 109 fits comfortably into this structure. The language at issue in Section 109 is as follows:

[3] Respondent States were among those who challenged EPA's *NOx SIP call* rule by asserting, among other claims, that costs were inappropriately considered in the determination of significant contribution.

> National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and *allowing an adequate margin of safety*, are requisite to protect the public health.

42 U.S.C. 7409(b)(1)(emphasis added); EPA App. 111a. The examples of mandates "phrased in general quantitative terms" given by the court in *NOx SIP call* include "ample margin of safety," "substantial restoration" and "major." The mandate in Section 109(b), "an adequate margin of safety," is virtually identical to "ample margin of safety" cited by the D.C. Circuit in *NOx SIP call* and analyzed by that court in *Vinyl Chloride*. Like *Vinyl Chloride* and similar cases, Section 109(b) itself does not, on its face, preclude consideration of factors other than health. Therefore, under the rationale of *Vinyl Chloride* and similar cases, Section 109(b) allows EPA to consider cost in setting a standard, because Congress has not expressly forbidden it, while under the rationale of *Lead Industries* and progeny, Section 109(b) precludes EPA from considering cost in setting a standard because Congress does not expressly allow it.

Lead Industries simply cannot be reconciled with the *Vinyl Chloride* line of cases regarding the authority of an administrative agency to consider a factor not expressly mentioned in the statutory language. Given the D.C. Circuit's reluctance to overturn *Lead Industries*, or otherwise reconcile its own jurisprudence, and the potential for avoiding the nondelegation issue, this conflict should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the Conditional Cross-Petitions if it grants certiorari on any form of the first question presented in EPA's petition.

Respectfully submitted,

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In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF IN RESPONSE FOR STATES OF OHIO, MICHIGAN AND WEST VIRGINIA

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QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency (EPA or the Agency) revised National Ambient Air Quality Standards (NAAQS) promulgated under Section 109 of the Clean Air Act, 42 U.S.C. 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the lower court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act, which rule resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation.

3. Whether the lower court erred in its unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of national ozone standards.

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STATEMENT OF THE CASE

Respondent States of Ohio, Michigan, and West Virginia submit this brief in response to the petitions by the United States Environmental Protection Agency (EPA or the Agency) and other parties for a writ of certiorari to review the decision of the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999), EPA App. at 1a. The case before the lower court arose from an EPA rulemaking regarding two pollutants regulated under the Clean Air Act – particulate matter (PM) and ozone. The Respondent States support the Statement of the Case presented in the response briefs filed by the American Trucking Associations, Inc., *et al.* (collectively, ATA) and the Appalachian Power Company, *et al.* (collectively, the CAA Industry Respondents), which discuss both PM and ozone. In this response, the Respondent States focus on just one aspect of the rulemaking – ozone.

Prior to amendment in 1990, the Clean Air Act, 42 U.S.C. 7401, *et seq.* (the Act, cited as CAA), applied an identical statutory program for six specified pollutants, *i.e.*, pollutants for which EPA issued criteria for meeting air quality. Section 109 of the Act, 42 U.S.C. 7409, required EPA to establish a national standard (a National Ambient Air Quality Standard or NAAQS) for each of these pollutants. Once EPA set the national standards, Section 110 of the Act, 42 U.S.C. 7410, required each State to develop a plan (a State Implementation Plan or SIP) to implement its own mix of air pollution control strategies to meet each standard. Each implementation plan had to provide for "attainment" of the national standard within five years, with the possibility of a five-year extension, from the time of the 1977 amendments.

By 1990, Congress recognized that its historic approach to compliance – simply commanding that all States reach attainment of each standard by a date certain – had

failed with regard to ozone. In the face of this failure, Congress established a new approach and a unique program for ozone. In Subpart 2 of Part D of the amended Act, 42 U.S.C. 7511-7511f (CAA Indus. App. at 2a-64a), Congress created an elaborate, 20-year plan for achieving national compliance with the ozone standard, and specified measures that would ensure continued compliance in the future. Integral to that program is the one-hour standard, which Congress codified in Subpart 2.

On July 18, 1997, EPA changed Congress's plan for ozone attainment. On that date, EPA gave final notice of its revision of the national standard for ozone, changing the standard from the one-hour limit of 0.12 ppm set by Congress, to an eight-hour limit of 0.08 ppm.[1] The Respondent States petitioned the District of Columbia Circuit to review that revision. On May 14, 1999, the D.C. Circuit remanded the revised standards for PM and ozone to EPA for further rulemaking. As to Subpart 2 and Congress's plan for regulating ozone, the lower court rejected EPA's conclusion that the Agency had the authority to rewrite the congressional plan. The court relied on Congress's directive that Subpart 2 must apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the Act. 175 F.3d at 1048; EPA App. at 38a. On this basis, the court held that EPA could enforce a revised ozone standard only "under Subpart 2," 175 F.3d at 1050; EPA App. at 43a, and that the Act precluded EPA "from requiring areas to comply either more quickly or with a more stringent NAAQS." 175 F.3d at 1049; EPA App. at 40a.

EPA's rulemaking and the questions it raises are of substantial importance to the States. However, as described

[1] The response briefs of ATA and the CAA Industry Respondents describe these limits in detail.

fully below, these questions arise here within the framework of well-established principles of judicial review and rules of statutory construction. The Court need not, therefore, revisit these principles in the context of this case.

POSITION ON GRANTING REVIEW OF QUESTION ONE OF EPA'S PETITION

The States of Michigan and West Virginia adopt the reasoning of the CAA Industry Respondents and ATA for the purpose of denying review of Question One of EPA's petition of certiorari. That question asks whether the lower court properly remanded the revised rules to EPA in order for EPA to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the lower court properly construed the scope of the Agency's discretion in defining those criteria. The State of Ohio does not oppose the Court's grant of certiorari on the "delegation" question.

If, however, the Court grants review of the delegation question, all three Respondent States urge the Court to reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents. In particular, as explained in the Brief of Respondent States in Support of the ATA and CAA Industry Cross-Petitions, the Court may avoid the delegation question altogether if it finds that EPA may consider cost in any revision of a standard under Section 109 of the Act.

REASONS FOR DENYING REVIEW OF QUESTIONS TWO AND THREE OF EPA'S PETITION

Questions Two and Three of EPA's petition ask this Court to review the lower court's decision that EPA may only enforce any revised ozone standard in conformity with Subpart 2 of Part D of the Act. EPA App. at 81a. EPA first

asserts that the lower court did not have jurisdiction to review EPA's decision. EPA Pet. at 19-25. Alternatively, EPA presents to this Court the same arguments EPA made to the lower court on the merits of the question, *i.e.*, the same arguments the lower court rejected in its initial decision and on rehearing. EPA Pet. at 25-29. For the reasons detailed below, neither of these questions warrants additional review by this Court.

A. The Court Should Deny Certiorari on Question Two of EPA's Petition, which Asks for Review of the Lower Court's Jurisdiction to Consider a Final Agency Action.

In its petition for rehearing before the lower court, EPA argued for the first time that the Agency's decision to change the ozone standard was not a final agency action ripe for review. Instead, EPA argues, the court's jurisdiction ended with its review of whether "the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. at 21. EPA bases this argument on two grounds: first, that the lower court's test for finality is "inconsistent with the test applied by this Court and other courts of appeals;" and, second, that the action is not ripe for review because it "deprived EPA of the opportunity to develop fully its interpretation and to reconcile any tensions that may arise in the future respecting implementation of the revised NAAQS." EPA Pet. at 10.

EPA's arguments ignore the plain language of the Act, which explicitly permitted review in this case, misrepresent the lower court's express findings, which were based on well-established principles of judicial review, and contradict the position EPA took in the final rulemaking that gave rise to this case. It is unnecessary, therefore, for this Court to grant EPA's petition on this question and to revisit established precedent in the context of this case.

1. *The Clean Air Act expressly authorizes review of EPA's action.* Section 307 of the Act provides that "action of the Administrator in promulgating any [NAAQS], . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia." CAA §307(b)(1); 42 U.S.C. 7607(b)(1). That petition for review must be filed within 60 days of the Federal Register notice of the promulgation, and that action may not be judicially challenged thereafter. *Id.*

As EPA points out, Section 307, 42 U.S.C. 7607, also authorizes review of a number of final actions that are locally or regionally appealable in the local circuit court of appeals, including the Agency's approval or promulgation of a state implementation plan under Section 110 of the Act, 42 U.S.C. 7410. That additional authorization, however, in no way limits review, pursuant to Section 307, of EPA's promulgation of rules *at the time of promulgation*. Nor does the case here present a request, express or otherwise, to review "classification challenges." EPA Pet. at 20. Rather, it is a challenge to a final rule governing the manner in which States are to achieve attainment of national ozone standards, and, thus, a challenge specifically provided for under Section 307's scheme for prompt review of rules and standards *upon promulgation*.

Where, as here, the Act expressly provides for the review granted by the lower court, this Court need not grant certiorari to consider this question.

2. *The lower court's decision on finality is consistent with the test applied by this Court and other courts of appeals.* EPA has correctly noted that, in this Court's view, two conditions must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, "the

action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178, citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Contrary to EPA's suggestion, the lower court applied this well-established test and correctly determined that both elements are satisfied here.

First, EPA's interpretation of Subpart 2 marks the "consummation" of its decisionmaking process. In the preamble to the final rule, EPA stated:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and recommendations of [the Clean Air Scientific Advisory Committee], public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

62 Fed. Reg. 38,873 (July 18, 1997)(emphasis in original). EPA explained that this "final decision" represented a change from its original intention to delay revocation of the 1-hour standard until after it had approved state plans for implementing the new standard. *Id.* EPA clarified that under this final decision "the provisions of subpart 2 . . . will continue to apply for so long as an area is not attaining the 1-hour standard. Once an area attains that standard . . . the provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards." *Id.* EPA then codified this decision in Section 50.9(b) of the final rule, from which the petitions below sought review. That section provides, "The 1-hour standard set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 40 C.F.R. 50.9(b); Mass. and N.J. App. at 113.

There is nothing tentative about this final decision. As the lower court found, it is "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." 195 F.3d at 8 (EPA App. at 78a), quoting *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990).

Second, as the lower court found, EPA's promulgation of a revised ozone NAAQS triggered a number of "obligations" and "legal consequences." As EPA acknowledged in the preamble to the final rule, the 8-hour standard becomes immediately effective to those areas designated "attainment" under the current standard.[2] Section 107 of the Act requires the Governor of each State, within one year after EPA's promulgation of a revised standard, to submit to EPA a list of designations for all areas in the State. CAA §107(d); 42 U.S.C. 7407(d). Under EPA's theory of the statute, this list of designations then triggers other actions by EPA to promulgate the designations, CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B), to classify the areas, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), and to apply an attainment date, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), then by the States to implement a plan for meeting the revised

[2] Reliance on preamble statements to explain final legislative rules is appropriate. *See Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157-58 & n.13 (1982).

requirements, CAA §172(b); 42 U.S.C. 7502(b). EPA's suggestion that finality does not occur until after it designates areas and the States implement plans ignores the burden on the States that flows from EPA's theory of the statute as reflected in the final rule.

The lower court's recognition of the finality of EPA's decision and the immediate obligations that flow from it is consistent not only with this Court's review in *Bennett v. Spear*, but also with the analysis of such questions invariably applied by the lower court and other courts of appeals. *See, e.g., Mobil Exploration & Producing U.S., Inc. v. Dept. of Interior*, 180 F.3d 1192, 1196-1200 (10th Cir. 1999); *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533, 540-41 (D.C. Cir. 1999); *Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998); *Ciba-Geigy Corp. v. USEPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986).

In short, there is no disagreement between this Court and circuit courts, including the D.C. Circuit, as to the proper inquiries to determine finality, nor even among the parties in this case. EPA's real contention is that the lower court incorrectly applied the law to the facts before it – a contention unworthy of this Court's review.

3. *EPA's action is ripe for review.* In determining that EPA's action was ripe for review, the lower court applied the well-established guidelines of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). As this Court has often stated, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. Here, the lower court determined that the case was fit for review because it presented "a pure question of law, the resolution of which would not benefit from a more concrete setting." 195 F.3d at 9, EPA App. at 79a.

EPA's suggestion to this Court that it should have had more time to further develop its interpretation and to "work through the various implementation provisions" could apply to any rulemaking. *See* EPA Pet. at 25. EPA could always develop its original interpretation and, through various implementation efforts, change its approach. Where, as here, the question is one of law, judicial review need not await further development, even if additional interpretation would prove useful. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Nor must judicial review await a more concrete injury to potential petitioners. Where, as here, "decisions to be made now or in the short future may be affected" by a court's decision, review is proper. *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974).

As with its decision on finality, the lower court applied well-established principles of jurisprudence to determine that the issues before it were fit for review and that delay would cause further hardship to the parties. It is unnecessary, therefore, for this Court to revisit these established principles in the context of this case.

B. The Court Should Deny Certiorari on Question Three of EPA's Petition, which Seeks Re-argument of the Case Below.

As an alternative to its argument that the lower court lacked jurisdiction to review the Agency's action, EPA asserts that the lower court did not decide the merits of the case correctly. As with its decisions on finality and ripeness, however, the lower court decided the merits of the Subpart 2 implementation question within the framework of well-established principles of statutory construction. The lower

court determined that EPA's decision was contrary to Congress's intent, as expressed in the plain language of the 1990 amendments to the Clean Air Act. Re-argument of this question is, therefore, unworthy of review by this Court.

1. *The interlocutory nature of the lower court's decision counsels against granting certiorari on Question Three presented by EPA.* In their briefs in response to the petitions for certiorari, ATA and the CAA Industry Respondents have fully explained the interlocutory nature of the lower court's decision, which requires additional rulemaking. *See* CAA Industry Respondents Brief in Response at 29-30; ATA Brief in Response at 16-18. The Respondent States support the arguments presented in those briefs.

2. *The lower court correctly decided that EPA may only implement any revised ozone NAAQS in conformity with Subpart 2 of Part D of the Act.* In the case below, the Respondent States argued that Subpart 2 codified the one-hour, 0.12 ppm ozone standard and, therefore, only Congress can promulgate a revised standard for ozone. The Respondent States based their argument on the explicit language of Section 181(a), 42 U.S.C. 7511(a), which applies the Subpart 2 program "by operation of law" to "[e]ach area designated nonattainment for ozone" under Section 107(d) of the Act, 42 U.S.C. 7407(d). The lower court rejected that argument, finding that EPA has authority to revise the ozone standard and to designate areas as nonattainment under Subpart 1 of Part D, which applies to all other nonattainment areas.

The court agreed, however, that EPA does not have authority to implement a more stringent ozone standard in conflict with the Subpart 2 program, which Congress established as the exclusive program for implementing the ozone standard. On rehearing, the court confirmed that "EPA can enforce a revised primary ozone NAAQS only in

conformity with Subpart 2." 195 F.3d at 10, EPA App. at 81a. The court was correct in its analysis that, even if EPA retains the authority to revise the ozone NAAQS and to designate areas not meeting that standard as nonattainment, EPA may only implement that standard using the classifications and attainment dates set by Congress in Subpart 2.

The lower court based its findings, as with its finality and ripeness findings, upon straightforward statutory construction. As *Chevron* instructs, if Congress has spoken on the "precise question at issue," then a court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984). Congress has clearly spoken here.

Congress enacted Subpart 2 as a comprehensive scheme to address ozone nonattainment. Specifically, as EPA acknowledges, Congress enacted Subpart 2 because the existing controls imposed under Subpart 1, which applies to other nonattainment areas, had failed to bring areas into attainment with the one-hour, 0.12 ppm standard. *See* H.R. Rep. No. 101-490 at 145-50, reprinted in II 1990 Legislative History at 3169-74. Rather than continue to treat all ozone nonattainment areas alike, Congress allowed the various areas between three and 20 years to attain the ozone standard, depending upon the extent of the area's ozone problem. *See id.* at 146-47. Congress provided additional measures that would apply in areas that failed to achieve attainment in 20 years, or that relapsed into nonattainment in the future.

The lower court held that the detailed and comprehensive nature of the Subpart 2 program manifests Congress's intent to require EPA to implement a revised ozone standard only in conformity with Subpart 2. Anything less would conflict with Congress's plan.

First, as noted above, Congress avoided the "one size fits all" approach of Subpart 1 and provided varying deadlines for attainment. In Subpart 2, Congress provided that if an area does not meet the standard on time, the area will "bump up" to the next classification, which includes a new attainment date. If an area does not achieve compliance by the final deadline for the most polluted category, sources within the area are then subject to fees for each ton of pollutant in excess of a baseline amount. In this way, Congress acknowledged that attainment was going to be extremely difficult, if not impossible, to achieve in some areas, and crafted a plan with strong incentives, specific programs, varying deadlines, and remedial measures for areas that failed to meet the applicable deadlines.

Second, Congress mandated specific controls for each category of nonattainment and directed EPA to impose certain requirements for reducing ozone. These specific requirements are a marked departure from the historic approach, which allowed States great latitude in determining what mix of controls is most appropriate to a certain region. Again, these specific requirements were included because Congress saw that the old model could not work for ozone. *See* I Legislative History of the Clean Air Act Amendments of 1990 at 1236 (statement of Rep. Fields)("We have placed what we hope are more realistic deadlines in the new law. We have not, however, simply continued to tell the states to do a plan to clean their air. That did not work. We have imposed some very stringent requirements on nonattainment areas which will in turn have to impose such requirements on industry in those areas").

Third, Congress created several mechanisms by which Subpart 2 was to control ozone attainment for the entire 20-year period and beyond. In conjunction with the bump-up provisions, in Section 182, 42 U.S.C. 7511a, Congress established reasonable further progress

requirements to ensure that States are, in fact, moving towards their goal. Congress also required areas that are "serious," "severe," or "extreme" nonattainment to include "contingency plans" with specific measures that would be implemented if an area does not meet a milestone. CAA §182(c)(9), (d), and (e); 42 U.S.C. 7511a(c)(9), (d), and (e). And Congress expressly mandated that Subpart 2 would continue to apply even if attainment were achieved. CAA §181(b); 42 U.S.C. 7511(b). As a whole, these provisions demonstrate that Congress anticipated that ensuring attainment and maintenance of the ozone NAAQS would be a continuing challenge and, more importantly, that Congress created a statutory structure within Subpart 2 to meet that challenge.

Because Congress has spoken to the "precise question" of ozone attainment under the Clean Air Act, the lower court was correct in its finding that, if EPA has the authority to revise the ozone NAAQS at all, then it may implement that standard only in conformity with Subpart 2. Any further re-argument of these issues within this straightforward statutory framework is unworthy of this Court's review.

3. *The lower court's decision restores certainty for the States.* The States of Massachusetts and New Jersey petition for certiorari on the merits of the Subpart 2 question, in part because the situation resulting from the lower court's decision "creates enormous uncertainty for the states as regulators." Mass. and N.J. Pet. at 29. On the contrary, the lower court's decision *restores* the certainty that existed prior to EPA's attempted interference with the program for ozone attainment that has been in place since 1990 — Congress's program under Subpart 2.

In fact, EPA's action would have created regulatory confusion in and among States because it created two

national standards instead of one. Many States, including both Michigan and Ohio, would have had different standards applicable in different parts of the State, as some portions of each would still be subject to the one-hour standard and some would not. *See* 62 Fed. Reg. 60,318, 60,323 (July 18, 1997); 63 Fed. Reg. 2,726, 2,762, 2,778 (January 16, 1998). The same would hold true among and between States, thus making the quantification of interstate pollution, the Petitioner States' primary concern, more difficult.

But, most fundamentally, implementation of a national ozone standard in a manner not in conformity with Subpart 2 would force the States to return to the failed compliance scheme that Congress abandoned when it created Subpart 2. Such a resurrection of the historic dilemma the States had in creating a plan to comply with an unachievable standard by a specific timeframe would not only create uncertainty, but would undoubtedly prove to be unsuccessful once again.

CONCLUSION

For these reasons, the Court should deny certiorari on Questions Two and Three presented by EPA. If the Court grants certiorari on Question One of EPA's petition, the "delegation" issue, then the Court should reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents.

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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF AMERICAN LUNG ASSOCIATION TO CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Environmental Protection Agency must base primary national ambient air quality standards solely on health effects relating to pollutants in the air.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

American Lung Association (ALA) adopts the Rule 29.6 disclosure, and list of parties below, set forth in ALA's petition for certiorari at ii-v.

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CITATIONS TO DECISIONS ENTERED IN THE CASE; BASIS FOR JURISDICTION IN THIS COURT; AND CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

American Lung Association (ALA) adopts the citations to decisions entered, the basis for jurisdiction in this Court, and the constitutional provisions, statutes and regulations involved in this case set forth in ALA's petition for certiorari at 1-2.

STATEMENT OF THE CASE

ALA adopts the statement of the case set forth in ALA's petition for certiorari at 2-15. In addition, ALA notes that in the rulemakings at issue, the Environmental Protection Agency (EPA) rejected requests that the agency consider factors other than health effects relating to pollutants in the air. 62 Fed. Reg. 38683-88 (July 18, 1997); 62 Fed. Reg. 38878-83 (July 18, 1997). Specifically, EPA found that in setting primary national ambient air quality standards, the agency was statutorily barred by the Clean Air Act from considering such other factors. *Id.* The court below affirmed this aspect of EPA's decision under step one of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), basing its ruling on the plain meaning of the Act and on longstanding D.C. Circuit precedent. App. 17-20.[1] *Accord, id.* at 13.

[1] Citations to "App." refer to the appendix filed by Massachusetts and New Jersey in No. 99-1263. In addition, for purposes of brevity, this response uses the phrase "non-health factors" to encompass all factors other than health effects relating to pollutants in the air.

ARGUMENT

The cross-petitions of American Trucking Associations (ATA) and Appalachian Power Company seek to reopen an issue that has been the subject of consistent interpretation by EPA for three decades and by the D.C. Circuit for two decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Specifically, cross-petitioners seek to reopen the long-standing conclusion of EPA and the D.C. Circuit that Clean Air Act § 109(b)(1) – which mandates national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety" – "bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). Cross-petitioners advance the curious assertion that by opening up this straightforward public health mandate to a plethora of other additional factors not specified in the statute, the extent of the congressional delegation can be *reduced*. The additional factors advocated by cross-petitioners are variously described as "overall impacts on society," Appalachian Power Cross-Pet. at 14, "economic or pragmatic factors," ATA Cross-Pet. at 22, "practical impacts," Appalachian Power Cross-Pet. at 15, "economic and social consequences," ATA Cross-Pet. at 23, or "broad economic, environmental, and indirect public health consequences." Appalachian Power Cross-Pet. at i. Moreover, cross-petitioners are apparently uncertain as to whether EPA's consideration of these factors is discretionary or mandatory. Their proposed cross-questions do not ask for a

determination that such consideration is mandatory,[2] and at least one of their cross-petitions advances the view that it is discretionary. Appalachian Power Cross-Pet. at 8 (the D.C. Circuit was "not unreasonable" in holding that EPA is not required to consider cost and feasibility; "a *requirement* to consider costs could allow costs to override public health") (emphasis in original). Elsewhere, however, they assert that EPA "must" consider non-health factors. Appalachian Power Cross-Pet. at 18; ATA Cross-Pet. at 22, 26. *Accord*, Ohio Rsp. to Cross-Pets. at 12.

The ATA and Appalachian Power cross-petitions should be denied. Cross-petitioners' argument that the Court can avoid the constitutional nondelegation question by adopting a statutory interpretation that greatly *increases* the scope of the congressional delegation is patently meritless. Moreover, under this Court's precedent, the constitutionality of the Act and EPA's interpretation can and should be upheld, regardless of how cross-petitioners' questions might be answered. Cross-petitioners do not even defend the D.C. Circuit's conclusion that the Clean Air Act is unconstitutional, and indeed ATA concedes that the Act "undisputedly" is constitutional. ATA Rsp. at 15. Cross-petitioners likewise do not explain how a constitutional statute can be made unconstitutional by an agency interpretation, and this Court's precedent establishes that it cannot.

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[2] The questions focus on whether EPA "must *ignore*" the non-health factors, ATA and Appalachian Power Cross-Pets., and Ohio Rsp. to Cross-Pets., at i (emphasis added), not on whether EPA must *consider* them.

Thus, far from contributing to this Court's resolution of the nondelegation question, the proposed cross-questions are irrelevant to – and a distraction from – that question. Cross-petitioners are simply seizing upon the lower court's incorrect nondelegation ruling as a means to obtain review of a question that was long ago decided – correctly – by EPA and the D.C. Circuit, and on which the Court has repeatedly denied certiorari.

I. THE QUESTION WHETHER NON-HEALTH FACTORS MAY BE CONSIDERED IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS IS SEPARATE FROM, AND UNNECESSARY TO THE RESOLUTION OF, THE NONDELEGATION ISSUE.

A. The Clean Air Act and EPA's Interpretation Pass Muster Under the Nondelegation Doctrine, Regardless of Whether the Act Prohibits, Allows, or Requires Consideration of Non-Health Factors.

In an attempt to obtain review of an issue unworthy of certiorari, cross-petitioners contend that the question whether Clean Air Act § 109(b)(1) permits EPA to consider non-health factors in setting primary NAAQS is "intertwined with" the nondelegation question. ATA Cross-Pet. at 7. *See also* Appalachian Power Cross-Pet. at 4. To the contrary, cross-petitioners' proposed issue addressing non-health factors is not implicated by the lower court's constitutional nondelegation ruling, and review of that statutory issue would in no way assist this Court's review of that ruling. Under this Court's nondelegation jurisprudence, the statutory provisions at

issue in this case, and EPA's interpretation of those provisions, are unquestionably constitutional, regardless of whether the statute requires that EPA consider only direct health impacts of air pollutants (as the lower court correctly held) or whether the agency may – or must – also consider other factors such as cost, socioeconomic factors, and indirect health impacts. Thus, to review the lower court's nondelegation ruling, the Court need not decide whether these other factors may or must be considered by EPA. We turn first to the constitutionality of the Act, and then to the constitutionality of EPA's interpretation of the Act.

Constitutionality of the Act. Cross-petitioners do not defend the lower court's holding that the Clean Air Act violates the nondelegation doctrine. *See* App. 12 (finding that "*statutory language* and an existing agency interpretation involve an unconstitutional delegation of power") (emphasis added); App. 4 ("nor is [an intelligible principle] . . . apparent from the statute"). To the contrary, ATA acknowledges that the Act is "undisputedly" constitutional. ATA Rsp. at 15.

ALA agrees. To pass muster under the nondelegation doctrine, Congress need only specify an "intelligible principle" to guide agency implementation. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). This Congress has plainly done here, with the mandate for NAAQS that "protect the public health" with "an adequate margin of safety," and with ample additional guidance in the Act and legislative history. This Court has "upheld, . . . without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373. Indeed, contrary to the lower court's insistence on a "determinate criterion,"

App. 5, the Court has upheld statutes specifying thoroughly non-determinate criteria such as "fair and equitable" prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), "excessive profits," *Lichter v. United States*, 334 U.S. 742, 778-86 (1948), "just and reasonable" rates, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944), and even the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). As Justice Scalia put it: "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting on other grounds, but agreeing with majority's conclusion that the statute at issue set forth an intelligible principle).

Indeed, this Court's precedent not only confirms ATA's concession that the Clean Air Act is "undisputedly" constitutional, but also establishes that the Act's constitutionality does not in any way depend on whether consideration of costs or other non-health factors is statutorily authorized or mandated. In *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490 (1981), concern was expressed by a dissenting Justice that Congress had written the Occupational Safety and Health Act so broadly as to allow three possible interpretations concerning the role of cost-benefit analysis: that Congress "required" the agency to engage in such analysis, that it "prohibited" the agency from doing so, or that it "permitted" the agency to do so. 452 U.S. at 545, 548 n.* (Rehnquist, J.). The majority squarely held that such statutory flexibility would *not* create a delegation problem: "Even [if] . . . there were three possible constructions of the

phrase 'to the extent feasible[,]' . . . *this would hardly have been grounds for invalidating § 6(b)(5) under the delegation doctrine.* After all, this would not be the first time that more than one interpretation of a statute had been argued." *Id.* at 541 n.75 (emphasis added).

As *American Textile* makes clear, this Court can resolve the nondelegation challenge to the Clean Air Act without reaching or deciding whether consideration of costs and other non-health factors is prohibited, allowed, or required.

Constitutionality of EPA's Interpretation of the Act. Moreover, consideration of the role of non-health factors is unnecessary to review of the constitutionality of EPA's interpretation of the Act. First, as stated above, the Court can and should rule – without resolving whether consideration of non-health factors is prohibited, allowed, or required – that the Act passes muster under the nondelegation doctrine. This "undisputed[ ]" constitutionality of the Act (ATA Rsp. at 15) necessarily entails the further conclusion that the lower court erred in requiring EPA to undertake a narrowing construction of the Act. A narrowing construction would only be appropriate if the Act "might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7. No party contends that the Act is or might be thought to be unconstitutional, and any such contention would be patently meritless under the Court's nondelegation precedent. Accordingly, no narrowing construction can possibly be required under the constitutional nondelegation doctrine, and the lower court's insistence on one was error. Because the premise of this conclusion (the undisputed constitutionality of the Act) does not depend in any way

on resolving what role non-health factors have in the setting of NAAQS, the conclusion itself does not require such resolution either.

Second, the core of the lower court's nondelegation ruling was the requirement that EPA specify a "determinate criterion for drawing lines." App. 5. This Court has held, however, that the Constitution does not require an agency to specify *any* rule of thumb to constrain its case-by-case determinations – much less a "determinate" rule of thumb:

> Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.

American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946). Moreover, because the Court's nondelegation precedent has repeatedly upheld non-determinate standards set forth directly in *statutes*, p. 6, *supra*, there is in any event no constitutional basis for requiring agency *interpretations* to be determinate. Accordingly, regardless of whether the Clean Air Act prohibits, allows or mandates consideration of non-health factors, the lower court erred in ruling that the nondelegation doctrine requires EPA to prescribe a "determinate criterion" to govern the agency's decisionmaking.

B. Cross-Petitioners' Proposed Interpretation of the Act Would Broaden, Not Narrow, the Scope of the Congressional Delegation, and Therefore Would Not Avoid the Constitutional Nondelegation Issue.

Cross-petitioners also argue that the Court could avoid deciding the constitutional nondelegation issue by construing the Act to allow consideration of non-health factors. ATA Cross-Pet. at 22; Ohio Rsp. to Cross-Pet. at 2. This argument must be rejected for two reasons.

First, as shown above, the Court's precedent clearly establishes that the Clean Air Act passes constitutional muster under the nondelegation doctrine. There is no merit to cross-petitioners' request that the Court avoid that clear-cut issue – especially when the consequence of such avoidance would be to reach out and decide an issue that has been settled in the agency and the D.C. Circuit for decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Second, cross-petitioners err in asserting that their interpretation would, if adopted, avoid the constitutional issue. Cross-petitioners' argument necessarily rests on the assumption that *expanding* the statutorily cognizable factors beyond health would *narrow* the scope of the congressional delegation. The opposite is true: for reasons stated by then-Justice Rehnquist in *American Textile*, a health-only mandate involves a far narrower delegation than one that allows an agency to balance health against other factors. ALA Pet. at 19-20 (quoting then-Justice Rehnquist).

Indeed, under cross-petitioners' open-ended construction of the Act, *any* conceivable factor would be cognizable by EPA. ATA Cross-Pet. at 23 ("the key text of Section 109(b) rules in consideration of 'public health,' but fails to *rule out* consideration of anything") (emphasis in original); Ohio Rsp. to Cross-Pets. at 11 (§ 109 "does not preclude consideration of *any* factor") (emphasis added). As these assertions make clear, if § 109(b)'s express reference to public health were to be construed as non-exclusive, there is no *statutorily* specified limit to the other factors EPA might be allowed to consider. As demonstrated by cross-petitioners' own multifarious descriptions of their proposed non-health factors, *see supra* at p. 2 (quoting cross-petitioners), reading such factors into the Act would result in a truly broad-ranging delegation. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 662 (1980) (Rehnquist, J., dissenting, explains why he concluded that the Occupational Safety and Health Act represents an unconstitutionally excessive delegation: "If § 6(b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards *for any reason whatsoever*, including even political feasibility.") (emphasis added).

Remarkably, cross-petitioners' proposed interpretation actually would take the Court in a direction diametrically *opposite* to that followed in *Natl. Cable Television v. United States*, 415 U.S. 336 (1974), one of two cases cited in *Mistretta* as having adopted a narrowing interpretation to avoid a nondelegation issue. Construing a statute requiring fees to be "fair and equitable taking

into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts*," *id.* at 337, *Natl. Cable* concluded that the italicized factors should be disregarded. *Id.* at 342-43. As a result, "[t]he phrase 'value to the recipient' is . . . the measure of the authorized fee." *Id.* By contrast, the interpretation proposed by cross-petitioners here would *add* factors to the public health factor enumerated in the statute, thereby *broadening* the scope of the congressional delegation. Cross-petitioners' novel proposal to adopt a "widening" construction of the Act would not avoid the nondelegation issue, and should be rejected.

II. CROSS-PETITIONERS' PROPOSED QUESTION SEEKS TO UPSET THREE DECADES OF AGENCY INTERPRETATION, AS WELL AS TWO DECADES OF D.C. CIRCUIT PRECEDENT ON WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI.

Twenty-nine years ago, only four months after enactment of the §§ 109 and 108 provisions governing NAAQS, EPA concluded that the Act "does not permit any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (April 30, 1971). Since that time, the agency has not wavered from its initial interpretation. *See, e.g.*, 62 Fed. Reg. 38683-88 (July 18, 1997).

Moreover, two decades of jurisprudence by the D.C. Circuit has affirmed that (as stated by the court below) "§ 109(b) . . . bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). *See Lead Industries Ass'n*

v. EPA, 647 F.2d 1130, 1148-51 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Natural Resources Defense Council v. Administrator*, 902 F.2d 962, 972-73 (D.C. Cir. 1990); *Natural Resources Defense Council v. USEPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (en banc) (*"Vinyl Chloride"*); *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Contrary to cross-petitioners' assertions that this caselaw has been superseded by *Chevron*, the D.C. Circuit has confirmed the exclusiveness of health factors in the NAAQS process repeatedly since *Chevron*. *NRDC v. Administrator; Vinyl Chloride; ALA v. EPA*. Moreover, *Lead Industries* itself, though pre-dating *Chevron*, was nonetheless decided "in Chevron step one terms." App. 18.

As cross-petitioners recognize, this Court has repeatedly denied certiorari on these decisions. ATA Cross-Pet. at 5. Moreover, these decisions are consistent with this Court's precedent. In *Union Electric Co. v. EPA*, 427 U.S. 246, 257 n.5 (1976), a decision construing the Clean Air Act, the Court concluded: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." Because Congress did not so provide in § 109(b)(1), EPA properly excluded those factors from consideration.

Likewise, the Court has recently held that the determination whether a product is "safe" within the meaning of the Food, Drug, and Cosmetic Act encompasses only whether "the *product itself* is safe," not whether regulation of the product could produce *indirect* adverse health effects. *FDA v. Brown & Williamson Tobacco Corp.*, U.S. Sup. Ct. No. 98-1152 (March 21, 2000), slip op. at 17

(emphasis in original). The Food and Drug Administration had argued that a cigarette ban would not be "safe" because it would produce indirect adverse effects: "current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop." *Id.* at 16. The Court rejected this argument:

> [T]he FDA's conception of safety would allow the agency, with respect to each provision of the FDCA that requires the agency to determine a product's "safety" or "dangerousness," to compare the aggregate health effects of alternative administrative actions. This is a qualitatively different inquiry. . . . Section 352(j) focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures.

Id. at 17-19. This ruling directly supports EPA's and the D.C. Circuit's consistent position that the agency may consider only health effects relating to pollutants in the air – not *indirect* health effects.

Given EPA's and the D.C. Circuit's long-settled interpretation; this Court's prior denial of certiorari; and the consistency of the D.C. Circuit's position with this Court's precedent, there is no reason for the Court at this late date to change course and accept cross-petitioners' proposed issue for review.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE ACT EXCLUDES NON-HEALTH FACTORS FROM THE SETTING OF PRIMARY NAAQS.

Another reason for denying certiorari on cross-petitioners' proposed issue is that the lower court was plainly correct in ruling that primary NAAQS must be based only on direct health effects of air pollutants. Section 109(b)(1) specifies that primary NAAQS must be "requisite to protect the *public health*." (Emphasis added.) Moreover, primary NAAQS must be "based on" air quality "criteria," § 109(b)(1), which in turn "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on *public health* or welfare which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." § 108(a)(2) (emphasis added). Thus, the statute clearly provides that factors other than direct health impacts of air pollutants have no place in the setting of primary national ambient air quality standards.[3]

This conclusion, clear enough on the face of §§ 109(b)(1) and 108(a)(2), is confirmed by other portions of the 1970 Act, which show that Congress knew how to expressly incorporate non-health factors when it wished to do so. For example, § 108(b)(1) provides for EPA to issue "information on air pollution control techniques, which information shall include data relating to the *cost* of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the

[3] Section 108(a)(2)'s reference to "welfare" is relevant only to the setting of *secondary* national ambient air quality standards, which are to "protect the public welfare." § 109(b)(2).

emission control technology." (Emphasis added.) However, such non-health data is not for the purpose of setting NAAQS, but rather is to be "issue[d] to the States and appropriate air pollution control agencies." § 108(b)(1). Indeed, § 109(b)(1) omits any reference to the § 108(b)(1) control techniques information, instead expressly providing that primary NAAQS are to be "based on . . . [the] *criteria*." (Emphasis added.)

Non-health factors were also referenced in other provisions of the 1970 Act. For example, the 1970 Act retained a preexisting provision mandating "a comprehensive study of the *economic impact* of air quality standards on the Nation's industries, communities, and other contributing sources of pollution, including an analysis of the national requirements for and the *cost* of controlling emissions to attain such standards of air quality as may be established pursuant to this Act." 1970 Act § 312(a), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Legislative History") at 7431. Tellingly, § 109(b)(1) omits any reference to such economic and cost analysis as a basis for NAAQS.

In addition, the 1970 Act provided that NAAQS were to be attained within three years from approval of air pollution control plans, § 110(a)(2)(A)(i), 1970 U.S. Code Cong. & Ad. News 1959-60, but allowed for extensions if it could be shown that "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period." § 110(e)(1)(A), 1970 U.S. Code Cong. & Ad. News 1962. Likewise, other provisions of the Act expressly incorporate non-health factors such as cost and feasibility. § 111(a)(1), 1970 U.S. Code Cong. & Ad. News

1963 (new source performance standards must provide for the degree of emission reduction that is "achievable," "taking into account the cost of achieving such reduction"); § 231(b), 1970 U.S. Code Cong. & Ad. News 1989 (aircraft emission standards shall take effect after such period as is necessary "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance").

"[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotations omitted). Recognizing this general principle, this Court has specifically held, in a decision construing the Clean Air Act: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Union Electric*, 427 U.S. at 257 n.5. Because Congress did not provide for non-health factors to be considered in setting primary NAAQS, EPA is not permitted to consider them.

The absence of non-health factors from the statutory provisions governing primary NAAQS, coupled with their presence in other portions of the Act, is fully sufficient grounds to reject cross-petitioners' proposed interpretation of the Act. But there is additional compelling evidence that Congress's exclusion of non-health factors from the setting of NAAQS was a deliberate choice.

1967 Act. For example, in the predecessor to the 1970 Act (the Air Quality Act of 1967), Congress had provided for issuance of air quality criteria and control techniques

information by EPA's predecessor agency, the Department of Health, Education, and Welfare (HEW). As in the 1970 Act, criteria were defined in terms of direct effects of air pollutants on health, in wording very similar to the comparable wording in § 108(a)(2) of the 1970 Act.[4] As in the 1970 Act, control techniques information encompassed consideration of non-health factors such as cost – indeed, it was even broader, expressly requiring "cost-effectiveness analyses."[5] As in the 1970 Act, ambient air quality standards were to be established. 1967 Act § 108(c), 1967 U.S. Code Cong. & Ad. News 523-24.

Despite the similarities, however, the 1967 Act differed in certain key respects from the 1970 Act. Under the 1967 Act, not only control techniques, but also air quality *criteria*, were to be "issue[d] to the *States*," § 107(b)(1), 1967 U.S. Code Cong. & Ad. News 522 (emphasis added), which were to have the first opportunity to establish ambient air quality standards. § 108(c)(1), 1967 U.S. Code Cong. & Ad. News 523. HEW was to determine whether

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[4] 1967 Act § 107(b)(2), 1967 U.S. Code Cong. & Ad. News 522 (criteria shall "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities").

[5] 1967 Act § 107(c), 1967 U.S. Code Cong. & Ad. News 522-23 (control techniques information was to include "technical data relating to the technology and costs of emission control," and "such data as are available on the latest available technology and economic feasibility of alternative methods of prevention and control of air contamination including cost-effectiveness analyses").

"such State standards are consistent with the air quality criteria *and recommended control techniques.*" *Id.* (emphasis added). If a state failed to establish standards, or if a Governor so requested, HEW was authorized to issue federal ambient air quality standards, which – like state-issued standards – were to be "consistent with the air quality criteria *and recommended control techniques.*" § 108(c)(2), 1967 U.S. Code Cong. & Ad. News 523-24 (emphasis added).

In enacting the 1970 Act, Congress rejected several key aspects of the 1967 approach. Of key importance, Congress *deleted* the linkage between control techniques information and ambient air quality standards: instead of being consistent with the criteria *and* control techniques information, standards were henceforth to be based only on the "criteria," § 109(b)(1) – i.e., based only on direct health effects of air pollutants.

This conclusion is further confirmed by another change made by the 1970 Act. Specifically, in 1970 Congress shifted responsibility for ambient standard-setting from the states to EPA, and accordingly deleted the 1967 Act's requirement that criteria be issued "to the States." § 108(a)(2) ("EPA shall *issue* air quality criteria") (emphasis added). In sharp contrast, Congress *retained* the 1967 Act's requirement that *control techniques information* be issued "to the States and appropriate air pollution control agencies," § 108(b)(1), thus confirming that that information – and the non-health factors addressed in it – is not for use in *EPA's* standard-setting.

Finally, the 1970 Act deleted the 1967 Act's requirement that control techniques information include "cost-

effectiveness analyses." If Congress did not provide for such analyses to be included even in control techniques information, which under § 109(b)(1) is irrelevant to NAAQS-setting, there is no basis for asserting that such analyses are required or even permissible in establishing the NAAQS themselves.

1970 House and Senate Bills. Further confirmation of Congress's decision to exclude non-health factors is found in the evolution of the 1970 committee bills. First, the Senate bill provided for ambient air quality standards to be based on health, with no provision for consideration of non-health factors. S. Rep. 1196, 91st Cong., 2d Sess. 86 (1970). The Senate Committee noted that "[i]n the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards." *Id.* at 2. The Senate Committee concluded that "the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible." *Id.* As Senator Muskie explained:

> The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met.

116 Cong. Rec. 32901-02 (September 21, 1970). *See Union Electric*, 427 U.S. at 257 ("[The Act's] requirements are of a 'technology-forcing character,' and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.") (citation omitted).

Second, although the House bill adopted an approach weaker than that of the Senate bill, the conferees rejected the House approach. The House bill, though it did not expressly require or allow NAAQS to be based on non-health factors, did not include as strong a mandate for consideration of health as the Senate bill. 116 Cong. Rec. 19224 (June 10, 1970). Moreover, other provisions of the House bill provided for consideration of non-health factors in implementing the NAAQS.[6] In response, the conferees deleted any references that they believed would diminish public health protection:

> In respect to economic feasibility, it is clear again beyond any shadow of a doubt that Congress intended that this not be a factor insofar as

[6] For example, the House bill had authorized EPA to file federal enforcement actions where NAAQS were not being met, and had provided that district courts would have jurisdiction to order appropriate relief, "giving due consideration to the practicability and to the technological and economic feasibility of complying with provisions of the [pollution control] plan established to implement such [ambient air quality] standards." 116 Cong. Rec. 19225 (House bill § 108(c)(4)). The conferees deleted that provision in favor of an enforcement authority not premised on practicability or technological and economic feasibility. 1970 Act § 113, 1970 U.S. Code Cong. & Ad. News 1966-68.

> the primary standards were concerned relating to public health. Economic feasibility was included in the House bill, it was hotly debated in conference and it was deleted.

Implementation of the Clean Air Act Amendments of 1970 – Part I, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works (February 16-23, 1972), at 18-19 (remarks of Senator Eagleton, a 1970 Act conferee).

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> Giving due consideration to economic and technological feasibility of compliance.
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Id. at 21 (remarks of Senator Eagleton).

In short, the evolution of the Senate and conference bills clearly shows that the absence of non-health factors from § 109(b)(1) was no accident, but reflects a deliberate congressional choice.

Post-1970 Congressional Action. Twice since 1970, Congress has enacted major overhauls of the Act – in 1977 and 1990. Yet, despite the longstanding agency and judicial interpretations construing the Act, Congress did not amend § 109 or 108 to allow or mandate consideration

of non-health factors in NAAQS-setting. To the contrary, Congress continued the 1970 Act's mandate that NAAQS be based on direct health effects of air pollutants, and instead made adjustments in the provisions governing implementation of NAAQS. *E.g.*, Pub. L. 95-95, § 129(b), 91 Stat. 746-47 (August 7, 1977) (adding § 172(a), which authorized attainment deadlines to be extended to 1982, with a possible further extension to 1987); Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990) (extensive amendments addressing designation of areas violating NAAQS, preparation of pollution control plans, and deadlines for attainment of NAAQS).

In 1977, Congress amended § 109 by adding a requirement for periodic review and revision of NAAQS at intervals of no more than five years. § 109(d). Far from changing § 109(b)(1)'s exclusive focus on direct health effects of air pollutants, Congress expressly reaffirmed that focus with an express cross-reference to § 109(b). § 109(d)(1).[7]

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[7] Section 109(d) also mandated a scientific review committee, which was to advise EPA (inter alia) "of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." § 109(d)(2)(C)(iv). Section 109(d) neither authorizes nor requires EPA to consider the § 109(d)(2)(C)(iv) factors in revising NAAQS, and the legislative history confirms that those factors were designed to be "of interest and assistance *to the States and to Congress* in fashioning future legislation." H.R. Rep. 294, 95th Cong., 1st Sess. 183 (1977), *reprinted in* 1977 Legislative History at 2650 (emphasis added).

In addition, the 1977 Amendments provided for consideration of non-health factors in various provisions of the Act, once again demonstrating that Congress knew how to incorporate such factors when it wished to do so. For example, the 1977 Amendments added § 317, 42 U.S.C. § 7617, which mandates an "economic impact assessment" in connection with certain specified proceedings, not including NAAQS, § 317(a), and even as to the covered proceedings cautions that the assessment requirement does not change the substantive factors EPA is required to consider. § 317(c).

Likewise, the 1990 Act added a mandate for hazardous air pollutant emission standards that expressly references cost:

> Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect.

§ 112(f)(2)(A), 42 U.S.C. § 7412(f)(2)(A) (emphasis added). Though Congress thus knew full well how to incorporate non-health factors such as cost into EPA standard-setting, it made no such change in § 109(b)(1).

In short, the statute and its development overwhelmingly demonstrate the correctness of the D.C. Circuit's longstanding precedent holding that the Act's provisions governing primary NAAQS bar EPA from considering "any factor other than health effects relating to

pollutants in the air." App. 13 (internal quotations omitted). Accordingly, the cross-petitions seeking to reopen that long-settled issue should be denied.

IV. THE QUESTIONS PROPOSED IN THE CROSS-PETITIONS SHOULD BE REJECTED AS ARGUMENTATIVE.

In addition to raising questions the Court should not and need not entertain, the questions proposed in the cross-petitions are argumentative, and should be rejected on that ground as well. Sup. Ct. R. 14.1(a) (questions "should not be argumentative").

The question proposed by ATA's cross-petition assumes (by using the phrase "given that") that consideration of non-health factors would avoid constitutional nondelegation issues. As shown above, however, the Clean Air Act – an EPA's interpretation of the Act – are constitutional, regardless of whether consideration of non-health factors is prohibited, allowed or required. Part I.A, *supra*. Moreover, incorporation of non-health factors into § 109(b)(1) would broaden, not narrow, the scope of the congressional delegation. Part I.B, *supra*.

The question proposed by Appalachian Power's cross-petition makes at least three argumentative assumptions. First, it assumes that EPA's decisions under § 109 consist exclusively of "risk management" – words that appear nowhere in the statutory provisions governing NAAQS. Second, it assumes that NAAQS have "*broad* economic, environmental, and indirect public health consequences." (Emphasis added.) The validity of certain impacts alleged by opponents of the 1997 NAAQS (*e.g.*,

alleged environmental impacts of changes in mine tax revenues, *see* App. 20, and alleged reductions in personal income that allegedly affect health) is disputed by many, including ALA.

Finally, and most egregiously, Appalachian Power's issue assumes that in the two rulemakings at issue here, EPA faced "a range of standards that reflect *uncertain and indistinguishable* health risks." (Emphasis added.) The EPA decisions under review "are based on some of the best scientific information the Agency has ever been able to rely on in NAAQS decision-making. In particular, the science underlying these decisions is much more extensive and of much better quality than the science underlying the existing NAAQS for PM and ozone." 62 Fed. Reg. 38881 n.53 (July 18, 1997). The D.C. Circuit did not in any way question the validity of the science relied on by EPA, and on the contrary found that EPA's decision to set a fine particulate standard "easily" satisfied the statutory standard. App. 51. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." *Id.*

Based on the science, EPA concluded that the 1997 NAAQS would each year prevent thousands of deaths, thousands of hospitalizations for respiratory and cardiopulmonary causes, tens of thousands of cases of reduced lung function and respiratory pain, and millions of days of missed work and restricted activity. ALA Pet. at 6, 12.

Appalachian Power's attempt to assume away these findings with an argumentatively worded question should be rejected.

V. THE COURT SHOULD REJECT CROSS-PETITIONERS' ARGUMENT THAT, INDEPENDENTLY OF ANY CROSS-PETITION, THE ISSUE CONCERNING NON-HEALTH FACTORS MAY STILL BE PRESENTED TO THE COURT.

Cross-petitioners ATA and Appalachian Power argue that their cross-petitions are unnecessary, because ATA and Appalachian Power allegedly can raise the non-health factors issue independently of any cross-petition. ATA Cross-Pet. at 27-30; Appalachian Power Cross-Pet. at 4. Indeed, Appalachian Power has even attempted to reformulate the nondelegation question presented by ALA, EPA, and Massachusetts in such a manner as to incorporate that issue. Appalachian Power Rsp. at i (asserting that nondelegation question should include consideration of "whether the court of appeals properly construed the scope of the Agency's discretion in defining [intelligible] . . . criteria."). To the contrary, as ALA has shown above, the non-health factors issue is not a part of – and is not necessary or helpful to resolution of – the constitutional nondelegation issue. Moreover, insertion of that issue into the case would not "preserve" the judgment below, but on the contrary would "change" it. *See* ATA Cross-Pet. at 27 (quoting *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999)).

ATA argues that because EPA must (for reasons other than the lower court's nondelegation ruling) conduct

further proceedings in any event, cross-petitioners' proposed issue would not change or enlarge cross-petitioners' rights. ATA Cross-Pet. at 27-30. This argument is doubly flawed. First, it is open-ended: because § 109(d)(1) mandates cyclical EPA review of NAAQS at intervals not exceeding five years, EPA will *always* be facing the need to conduct further proceedings. Second, the judgment below did not simply require EPA to conduct further proceedings, but also defined requirements governing those proceedings. In particular, EPA must identify a "determinate criterion for drawing lines," App. 5, in a manner that considers only "health effects relating to pollutants in the air." App. 13 (citation omitted). Cross-petitioners' proposed question would (if cross-petitioners prevail) change these requirements, such that cross-petitioners would have an opportunity to argue on remand for consideration of non-health factors – and EPA would no longer be able to assert a lack of statutory authority to undertake such consideration. Indeed, Ohio argued below not only that EPA has authority under the Clean Air Act to consider non-health factors, but also that the Unfunded Mandates Reform Act *requires* the agency to exercise that authority by considering those factors. Ohio Opening Br. in D.C. Cir. No. 97-1440 at 15 ("the CAA, in conjunction with UMRA, affirmatively *compels* EPA to consider cost and benefits") (emphasis added). *See also* p. 3, *supra* (citing assertions by cross-petitioners in this Court that EPA must consider non-health factors).

In short, cross-petitioners' argument concerning non-health factors seeks both a change in – and an enlargement of cross-petitioners' rights under – the D.C. Circuit's judgment. Accordingly, cross-petitioners' assertion

that they may raise that argument independently of a cross-petition should be rejected.

CONCLUSION

For the foregoing reasons, the cross-petitions of ATA and Appalachian Power should be denied.[8]

DATED: April 12, 2000.

Respectfully submitted,

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[8] ALA takes no position on the cross-petition of Citizens for Balanced Transportation.

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Nos. 99-1426, 99-1431 and 99-1442

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

APPALACHIAN POWER COMPANY, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

CITIZENS FOR BALANCED TRANSPORTATION, ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL CROSS-RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly reaffirmed the long-standing principle that, in setting and revising National Ambient Air Quality Standards (NAAQS) under Section 109 of the Clean Air Act, the Environmental Protection Agency (EPA) may not consider the costs, technical feasibility, or other alleged effects of implementing measures to attain the NAAQS (Nos. 99-1426 and 99-1431).

2. Whether the court of appeals properly resolved various claims, by postponing decision or rejecting them outright, that EPA's primary and secondary NAAQS for fine particulate matter ($PM_{2.5}$) are inadequate to protect public health and welfare (No. 99-1442).

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In the Supreme Court of the United States

No. 99-1426

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 99-1431

APPALACHIAN POWER COMPANY, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 99-1442

CITIZENS FOR BALANCED TRANSPORTATION, ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL CROSS-RESPONDENTS IN OPPOSITION

STATEMENT

The federal government's petition for a writ of certiorari (No. 99-1257) seeks review of the court of appeals' ruling that the Environmental Protection Agency (EPA) has interpreted the Clean Air Act (CAA) in a way that effects an unconstitutional delegation of legislative power. 99-1257 Pet. I. The petition also challenges the court of appeals' premature and mistaken ruling limiting how EPA may implement one of the two remanded National Ambient Air Quality Standards (NAAQS) at issue—the ozone NAAQS. *Ibid.* The cross-petitions seek to introduce two sets of unrelated issues involving particular details of the underlying rulemakings.

First, two groups of industrial interests, the American Trucking Associations, *et al.* (ATA), and Appalachian Power Company, *et al.* (APC), ask this Court to review the court of appeals' unanimous statutory ruling that, in setting and revising NAAQS, EPA is precluded from considering the economic costs and effects of implementing those standards. ATA Cross-Pet. i; APC Cross-Pet. i. That ruling reaffirms EPA's 30-year-old construction of the CAA and a series of unanimous judicial decisions stretching over 20 years. See 99-1257 Pet. App. 19a-21a.

Second, a group of environmental interests, Citizens for Balanced Transportation, *et al.* (CBT), seeks review of particular challenges to EPA's selection of the 24-hour primary NAAQS for particulate matter (PM) of 2.5 microns or less ($PM_{2.5}$) and its selection of the secondary NAAQS for $PM_{2.5}$. CBT Cross-Pet. i. The court of appeals concluded that it could not reach most of those issues in light of its remand to the agency. See 99-1257 Pet. App. 4a-5a.

We describe below the court's reasoning on the issues raised by the cross-petitions.

1. The court of appeals' decision in this case addresses a broad range of industry and environmental challenges to EPA's ozone and PM NAAQS. Among other things, the decision reiterates the long settled principle that, "in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards." 99-1257 Pet. App. 19a. The court of appeals has consistently held that EPA must set NAAQS based on the "health effects relating to pollutants in the air" and not on alleged costs or other effects that may result from implementation of the NAAQS. *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990) (EPA need not consider alleged health effects associated with unemployment), cert. denied, 498 U.S. 1082 (1991); see also *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980).

The court expressly considered and rejected ATA's and APC's arguments that it should reconsider its decision in *Lead Industries* because that case was decided without the benefit of this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court explained:

> The *Lead Industries* decision was made in *Chevron* step one terms, * * * as the post-*Chevron* progeny of *Lead Industries* have made clear. [*Natural Resources Defense Council, Inc.* v. *EPA*], 902 F.2d [962,] 973 [(D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991)] ("Consideration of costs . . . would be flatly inconsistent with the statute, legislative history and case law on this point"); *NRDC* v. *EPA*,

824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (in banc) ("*Vinyl Chloride*") ("[S]tatute on its face does not allow consideration of technological or economic feasibility.").

99-1257 Pet. App. 19a-20a.

The court of appeals additionally considered and rejected the argument that, even if EPA could not consider costs in initially setting NAAQS, it could do so when revising NAAQS. 99-1257 Pet. App. 20a. Finally, the court rejected the industrial groups' argument that Congress's directions to the Clean Air Scientific Advisory Committee (CASAC) to advise EPA on, among other things, "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of NAAQS, CAA, § 109(d)(2)(C)(iv), 42 U.S.C. 7409(d)(2)(C)(iv), signals that EPA should consider those factors in revising NAAQS. 99-1257 Pet. App. 21a. Instead, the CAA directs CASAC to provide that advice in light of EPA's separate duty to give the States information on control strategies. *Ibid.*

2. CBT challenged as arbitrary and capricious EPA's decision not to set a more stringent 24-hour primary NAAQS and more stringent 24-hour and annual secondary NAAQS for $PM_{2.5}$. Because the court of appeals remanded the $PM_{2.5}$ NAAQS on nondelegation grounds, the court of appeals did not rule on CBT's claims except in one narrow respect. 99-1257 Pet. App. 5a, 56a. In the final rule, EPA had announced its decision to address adverse effects that fine PM may have on visibility by establishing secondary $PM_{2.5}$ NAAQS (at the same levels as the primary $PM_{2.5}$ NAAQS) and by implementing the Regional Haze Program described in Section 169A of the CAA, 42 U.S.C 7491. 99-1257

Pet. App. 5[illegible]a; 62 Fed. Reg. 38,652, 38,683 (1997). The court of appeals rejected CBT's argument that Section 109(b)(2), 42 U.S.C. 7409(b)(2), requires EPA to set secondary NAAQS that will eliminate *all* adverse effects on visibility and deprives EPA of authority to address some impairment of visibility through another program. 99-1257 Pet. App. 57a. The court explained that the CAA included the Regional Haze Program to address adverse effects on visibility that may persist in areas such as national parks "notwithstanding attainment and maintenance of all [NAAQS]." *Ibid.*

3. Neither ATA, APC, nor any other party sought rehearing on the cost issue. CBT filed petitions for rehearing and rehearing en banc as to all of its claims. CBT's petitions were denied without dissent. 99-1257 Pet. App. 71a, 101a.

ARGUMENT

As our petition for a writ of certiorari explains, the court of appeals has erred in two fundamental respects: (1) it remanded EPA's revised PM and ozone NAAQS based on an aberrant notion of the nondelegation doctrine (99-1257 Pet. 9-10, 11-19); and (2) it prematurely and mistakenly decided how EPA should eventually implement the ozone NAAQS (99-1257 Pet. 19-30). As our reply brief explains, respondents have failed to provide persuasive reasons against review. Instead, they have recharacterized the court of appeals' decision in ways that obfuscate the issues. The cross-petitions at issue here add another layer of complexity and confusion. They raise no issue that would independently warrant review or that would assist the Court in resolving the core nondelegation issue. To the contrary, the cross-petitions would complicate the case with issues that, on the one hand, have long been settled or,

on the other hand, the court of appeals had no occasion to reach.

1. The flaws in the court of appeals' nondelegation analysis are not difficult to discern. This Court has developed the nondelegation doctrine to preserve the Constitution's separation of governmental powers. *E.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 371-372 (1989). It prohibits *Congress* from vesting its legislative power in an executive branch agency. *Ibid.* The court of appeals erred because it misconceived the nondelegation doctrine as a judicial check on agency discretion. See 99-1257 Pet. App. 14a. The court of appeals' decision confuses two distinct lines of inquiry and, in the process, wrongly sets aside legitimate agency action. The Court should therefore correct that fundamental misconception and remand the case to the court of appeals with directions to review the EPA's rules under the correct standard of review. See 99-1257 EPA Reply Br. 2-6.

ATA and APC urge a different course. They argue that the Court should *broaden* the inquiry and use the court of appeals' mistake as a vehicle for setting aside long-settled statutory principles that have guided EPA's implementation of the CAA for 30 years. They specifically challenge the firmly established principle that EPA should set NAAQS based on the public health and welfare effects caused by the pollutant's presence in the ambient air and not on the potential economic costs or other alleged effects of implementing the NAAQS. See ATA Cross-Pet. 14-27; APC Cross-Pet. 14-25. The court of appeals was divided on the nondelegation issue, but it unanimously rejected the industrial groups' arguments on this point and reiterated its past holding that the CAA directs that questions of economic costs and the other effects of implementing

NAAQS can be considered only as part of the implementation process. 99-1257 Pet. App. 19a-21a.

The Court should decline ATA's and APC's invitation to complicate consideration of the nondelegation issue. The court of appeals' decision is correct as to the issue they raise. Moreover, it rests on settled law that has long guided the actions of EPA, Congress, and the courts. Contrary to ATA's urgings, the constitutional question of whether Congress has vested EPA with legislative power is not "tightly intertwined" (ATA Cross-Pet. 7) with the statutory issue of whether Congress directed EPA to set NAAQS based solely on health and welfare effects of ambient pollution concentrations.

a. Congress introduced the NAAQS-based framework through the enactment of the Clean Air Act Amendments of 1970.[1] Since that time, EPA has consistently applied Section 109 according to its terms, which require EPA to set primary NAAQS at levels "requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1). EPA has consistently rejected the notion that, when promulgating NAAQS, it may consider costs, technical feasibility, or related factors.[2] ATA and APC ask this Court to overturn 20

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[1] As this Court has recognized, Congress was dissatisfied with progress under the Air Quality Act of 1967, Pub. L. No. 90-148, § 2, 81 Stat. 485, and enacted the Clean Air Act Amendments of 1970 to make far-reaching changes in the Nation's approach to air pollution control. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 (1975); see *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256-257 (1976).

[2] When promulgating the first NAAQS, Administrator Ruckelshaus announced that no revisions were made to the proposed NAAQS in response to comments questioning the feasibility of their implementation. He stated that the CAA "does not permit

years of court of appeals precedent—decided in the course of reviewing predecessor NAAQS—upholding that interpretation.[3]

As ATA acknowledges (Cross-Pet. 5-6), this Court has repeatedly declined to review the issue that ATA and APC press here.[4] There is no reason to reach a different result now. ATA offers no support for its claim that the court of appeals itself "now lacks confidence" in the holding of *Lead Industries* (Cross-Pet. 17-18). To the contrary, the court of appeals has repeatedly rejected ATA's and APC's principal arguments without a single dissent.[5] The cross-petitions do not raise a controversial issue; the entire District of

any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (1971). See also, *e.g.*, 62 Fed. Reg. at 38,683-38,688 (detailed response to comments on this issue in the PM rulemaking).

[3] *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); see also *Natural Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146, 1158-1159 (D.C. Cir. 1987) (en banc) (*Vinyl Chloride*).

[4] See Pet. at 8-11, *St. Joe Minerals Corp.* v. *EPA*, cert. denied, 449 U.S. 1042 (1980) (No. 80-483); Pet. at 18-23, *American Petroleum Inst.* v. *Gorsuch*, cert. denied, 455 U.S. 1034 (1982) (No. 80-871).

[5] Since 1980, 15 judges of the District of Columbia Circuit—including Judge Bork writing for the court en banc in *Vinyl Chloride*—have expressed approval of EPA's interpretation. Contrary to APC's assertion (Cross-Pet. 24), nothing in any of the decisions after *Lead Industries* remotely suggests that the court of appeals felt "its hands were tied" by that decision. See cases cited in note 3, *supra*.

Columbia Circuit has long viewed the matter as settled. See 99-1257 Pet. App. 19a. Indeed, if ATA and APC thought otherwise, they should have challenged the panel's unanimous ruling through a petition for rehearing en banc.

The court of appeals and EPA have correctly concluded that Congress "has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Section 109(b)(1) of the CAA directs EPA to set primary NAAQS at a level "requisite to protect the public health." See 42 U.S.C. 7409(b)(1). It does not direct EPA to consider economic and other costs when setting NAAQS, and there is no basis for inferring that Congress intended those factors to be considered at that initial stage of the regulatory process. The language and structure of the 1970 CAA demonstrate that the overriding purpose of NAAQS promulgation is to determine, as the first step of the CAA regulatory program, the ambient air quality standards that are necessary to protect the public health and welfare. Neither Section 108, which specifies the kinds of factual information upon which NAAQS must be based, nor Section 109, which contains the legal test NAAQS must meet, discusses or otherwise suggests any consideration of cost or technical feasibility. See *Lead Indus. Ass'n*, 647 F.2d at 1149; *Vinyl Chloride*, 824 F.2d at 1158.[6]

[6] The States of Ohio, Michigan, and West Virginia suggest in their brief supporting the cross-petitions (Midwest States Br. 9-13) that there is a broader inconsistency in the District of Columbia Circuit's case law with respect to whether administrative agencies ever have authority to consider factors other than those explicitly mentioned in enabling legislation. This alleged conflict goes beyond any question presented in a timely petition or cross-peti-

Section 109(b)(1) specifically requires NAAQS to be "based on" the air quality "criteria" that EPA issues under Section 108. 42 U.S.C. 7409(b)(1). Section 108(a)(2), in turn, limits the kind of information to be included in the "criteria" to "the latest scientific knowledge" about effects on health and welfare "which may be expected from the presence of such pollutant in the ambient air." 42 U.S.C. 7408(a)(2). Section 108(a)(2) makes no mention whatsoever of effects from *implementing* the NAAQS—it mentions only effects resulting from the presence of a criteria pollutant in the air. That silence is telling in light of other sections of the Clean Air Act Amendments of 1970 where Congress expressly provided that EPA should consider costs and similar factors in making decisions.[7]

The structure of the CAA also indicates that EPA should promulgate NAAQS based on health and welfare effects and not on the basis of costs or alleged adverse effects that may result from their implementation. Moreover, the question cannot be addressed in such abstract terms, because the answer depends on the purpose and context of a particular statute. The principle of *expressio unius est exclusio alterius* is merely one tool of statutory construction, not a rule of law, see *Shook* v. *District of Columbia Fin. Responsibility & Management Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998); *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992), and therefore its application can be expected to differ from one circumstance to another.

[7] *E.g.*, Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 110(e)(1), 84 Stat. 1682 (authorizing EPA to grant States up to a two-year extension of a NAAQS attainment date if necessary technology is not available); § 111(a)(1), 84 Stat. 1683 (requiring consideration of economic and technological feasibility in establishing standards of performance for new stationary sources); § 231(b), 84 Stat. 1704 (authorizing consideration of economic and technical feasibility in establishing aircraft emission standards).

tation. As this Court recognized long ago, the CAA is a "technology-forcing" statute that sets ambitious goals to protect public health and welfare. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 91 (1975). In that respect, Congress has indicated expressly when and to what extent costs and implementation effects shall be considered in the regulatory process. See *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976).[8]

For example, States are entitled to develop State Implementation Plans (SIPs) governing how NAAQS will be implemented within their borders. See CAA § 110, 42 U.S.C. 7410. States may properly consider the costs of NAAQS implementation when formulating the SIPs, and EPA may not override those judgments so long as the SIP will achieve attainment of the NAAQS. See *Union Elec. Co.*, 427 U.S. at 256-269.[9] The Court also recognized that the CAA does not allow a State to rely on those considerations at the expense of meeting the statutory deadlines for attaining the national health-based standards. *Id.* at 266-269.[10] The Court's

[8] See 427 U.S. at 269 ("Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking.").

[9] See, *e.g.*, 427 U.S. at 266 ("Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires * * * and industries with particular economic or technological problems may seek special treatment in the plan itself.").

[10] See, *e.g.*, 427 U.S. at 268-269 ("In short, the [Clean Air Act Amendments of 1970] offer ample opportunity for consideration of claims of technological and economic infeasibility. Always, how-

longstanding decision in *Union Electric*, describing the CAA as a "technology-forcing" statute and explaining how cost considerations are introduced into the regulatory scheme on a State-by-State basis in the implementation process, would make little sense if EPA had to promulgate NAAQS based on an analysis of costs and related implementation factors at the outset of the regulatory process.[11]

As the court of appeals has repeatedly noted, the legislative history of the 1970 Amendments confirms the paramount importance of setting primary NAAQS based solely on the health effects posed by the pollutant in the ambient air. See *Vinyl Chloride*, 824 F.2d at 1158; *Lead Indus. Ass'n*, 647 F.2d at 1149. For example, the Senate report accompanying the 1970 Amendments states:

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many

ever, care is taken that consideration of such claims will not interfere substantially with the primary goal of prompt attainment of the national standards. * * * Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.").

[11] Section 110 of the 1970 CAA, which was construed by the Court in *Union Electric*, has since undergone considerable revision, but the principles set forth above have not been altered. See *Virginia* v. *EPA*, 108 F.3d 1397, 1407-1409 (D.C. Cir. 1997); 42 U.S.C. 7410(k).

> areas, even with application of available technology, would still be deleterious to public health.
>
> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down * * *.

S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970). In other words, the primary NAAQS should be based on health effects rather than economic or technical feasibility, and as a result, the NAAQS have a "technology-forcing" effect. See *Train*, 421 U.S. at 91; *Union Elec. Co.*, 427 U.S. at 257, 269.

At bottom, APC urges this Court to revisit the long-settled question of whether EPA should consider costs and other alleged implementation effects in setting NAAQS because, in APC's view, its preferred approach would be "wise social policy." See, *e.g.*, APC Cross-Pet. 6-7. But Congress concluded otherwise, and Congress's choice was certainly a rational one. Congress reasonably concluded that NAAQS should be based on health and welfare considerations alone so that Congress and the public know that EPA's judgments on the health and welfare threats posed by particular criteria pollutants are not compromised by considerations of economic and technical feasibility. As this Court recognized in *Union Electric*, Congress provided the States with flexibility in the implementation process to consider the economic and technical feasibility of attainment, 427 U.S. at 266-269, but it reserved to itself the prerogative of deciding – as a matter of legislative choice – whether and how to alter the statutory scheme

if public health needs should prove to conflict with an industry's economic viability.[12]

Congress has since recognized and exercised that prerogative. See 62 Fed. Reg. at 38,685. In the course of formulating the Clean Air Act Amendments of 1977, Congress was well aware that some areas of the country had been unable to attain some of the NAAQS. See, *e.g.*, H.R. Rep. No. 294, 95th Cong., 1st Sess. 207-217 (1977). It was also aware that some of the NAAQS criteria pollutants might be non-threshold pollutants and that significant scientific uncertainties are inherent in setting health-based standards. See *id.* at 43-51, 110-112. In response, Congress made significant changes in the provisions for implementing the NAAQS, including, for example, an extension of the deadline for attaining the ozone NAAQS. It also amended Sections 108 and 109 of the Act to require periodic review and revision of NAAQS and to establish CASAC. Nevertheless, Congress did not change the substantive criteria for setting and revising NAAQS. See 62 Fed. Reg. at 38,685 & n.66 (describing the 1977 Amendments).[13]

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[12] See *Lead Indus. Ass'n*, 647 F.2d at 1150 ("if there is a problem with the economic or technological feasibility of the lead standards, * * * any * * * party affected by the standards, must take its case to Congress, the only institution with the authority to remedy the problem"); 99-1257 Pet. App. 68a-69a (Tatel, J., in dissent, noting the role of politically accountable States in implementing NAAQS and the availability of congressional relief).

[13] In addition to requiring CASAC to advise EPA on issuing new or revised criteria and NAAQS, 42 U.S.C. 7409(d)(2)(B), Congress separately charged CASAC with advising EPA on implementation effects, 42 U.S.C. 7409(d)(2)(C). But that does not mean, as APC contends (Cross-Pet. 22), that EPA is to consider these effects in setting or revising NAAQS. See 99-1257 Pet. App. 21a; p. 4, *supra*. The legislative history removes any doubt on that matter. The House Report indicates that Congress did "not intend this provision to be used as a basis for the Administrator to disapprove any State's plan," but "may be of interest and assistance to the States and to Congress in fashioning future legislation." H.R. Rep. No. 294, *supra*, at 183.

Congress exercised that prerogative again in 1990. The Clean Air Act Amendments of 1990 responded to persistent nonattainment problems by adjusting the scheme for their implementation. See, *e.g.*, CAA §§ 181-192, 42 U.S.C. 7511-7514a. Significantly, Congress was fully aware of how NAAQS are promulgated, and it did not change the legal standard on which NAAQS are based. To the contrary, both the House and Senate Reports accompanying the 1990 Amendments expressly reflect the understanding that primary NAAQS are to be "set at a level that 'protects the public health with an adequate margin of safety,' *without regard to the economic or technical feasibility of attainment*." H.R. Rep. No. 490, 101st Cong., 2d Sess., Pt. 1, at 145 (1990) (emphasis added); accord S. Rep. No. 228, 101st Cong., 1st Sess. 5 (1989). Congress's actions confirm that the court of appeals and EPA have correctly discerned congressional intent to preclude consideration of economic and technical feasibility in setting and revising NAAQS. Cf. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-602 (1983) (Congress "affirmatively manifested its acquiescence" in IRS policy by articulating the policy in committee reports accompanying related legislation); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction").

ATA attempts to overcome the overwhelming evidence of congressional intent by drawing analogies from this Court's decision in *Industrial Union Department* v. *American Petroleum Institute.*, 448 U.S. 607 (1980). See ATA Cross-Pet. 15-16. That case, however, involves a different statute, with different language, that creates an entirely different regulatory program. The Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq.*, directs the Secretary of Labor to establish "occupational safety and health standard[s]," 29 U.S.C. 655(b), that are directly applicable to industrial employers and that are directly enforced by federal officials. 29 U.S.C. 658-659. The OSH Act *expressly* requires the Secretary to consider whether standards dealing with toxic materials or harmful physical agents are "feasible." 29 U.S.C. 655(b)(5).

The CAA's NAAQS promulgation process, by contrast, is simply the first step in a federal-state regulatory program and does not create standards that are themselves directly applicable to any air pollution source. The CAA directs EPA to set NAAQS at levels of air quality "requisite" to protect public health and welfare, but the CAA empowers the States to determine appropriate emission limitations and other controls on individual air pollution sources. See generally *Train, supra*; *Union Elec. Co., supra.* Unlike the OSH Act scheme, the CAA requires the Administrator to determine, as an initial matter, the exposure limitations necessary to protect health and welfare and leaves to the States discretion to consider—consistent with their obligation to meet the attainment deadlines—the economic or technological feasibility of compliance. See *Union Elec. Co.*, 427 U.S. at 259 (quoting S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970)).

ATA's and APC's reliance on the court of appeals' en banc decision in *Vinyl Chloride*, 824 F.2d at 1158-1159, is similarly misplaced. See ATA Cross-Pet. 15-18; APC Cross-Pet. 9-10, 19. That decision in no way "strongly suggests" that the District of Columbia Circuit "now lacks confidence" in its *Lead Industries* decision. ATA Cross-Pet. 17-18. To the contrary, the court concluded that EPA should consider economic and technical feasibility when setting individual *emission standards* for specific hazardous air pollutants under Section 112 of the CAA, 42 U.S.C. 7412. It expressly distinguished Section 109's method for promulgating NAAQS. Writing for the en banc court, Judge Bork explained that the language and structure of the CAA support the conclusion that "Congress simply did not intend the economics of pollution control to be considered in [Section 109's] scheme of ambient air regulations." 824 F.2d at 1159.[14]

[14] We note that EPA attempts to estimate the costs and benefits of implementing NAAQS as part of its Regulatory Impact Analysis (RIA), but it does so only for informational and implementation planning purposes and not as a part of its standard setting process. See 62 Fed. Reg. at 38,702; C.A. App. (PM) 3461-3462. ATA and APC rely selectively on those estimates to create a distorted picture of the potential costs and benefits of the NAAQS in this case. For example, APC and ATA cite EPA's estimate of the cost of fully attaining the revised PM standards ($37 billion) without mentioning EPA's estimate that those standards would produce quantifiable benefits of $20 to $110 billion. Compare APC Cross-Pet. 13 n.23 and ATA Cross-Pet. 4 with C.A. App. (Ozone) 2925. Nor does either mention EPA's estimate that the *net* quantifiable benefits to be derived from only partial attainment of the combination of the revised PM and ozone NAAQS would range from $9.5 to $96 billion. C.A. App. (PM) 3488. Furthermore, it is difficult, if not impossible, for EPA to account for the future development of innovative control technologies when it sets or revises NAAQS. C.A. App. (PM) 3471-3472. Because of the technology-forcing character of the NAAQS, EPA has historically

b. As the foregoing discussion shows, the ATA and APC cross-petitions do not present an issue that would warrant review in its own right: The court of appeals has repeatedly and correctly rejected ATA's and APC's arguments; those rulings have not produced any dissent; this Court has repeatedly declined to review the issue; and ATA and APC did not seek relief from the en banc court before petitioning for a writ of certiorari yet again. ATA nevertheless argues that this Court should combine its review of the nondelegation issue and this particular statutory issue because the issues are "inextricably intertwined." ATA Cross-Pet. 7; see also APC Cross-Pet. 4 (cost issue is "fairly within the scope of the initial petitions"). That assertion is correct only in the haphazard sense that a fishing line might become intertwined with a tree limb. Enlarging the grant would complicate an already complex case and would require the Court to disentangle inquiries that are properly separate and that the court of appeals treated as distinct. Indeed, the court of appeals panel was divided on the nondelegation issue, but unanimous on the supposedly "intertwined" statutory issue that ATA and APC present.

ATA concedes, in response to our petition, that Section 109 of the CAA itself does not violate the nondelegation doctrine. 99-1257 ATA Br. 15 (Section 109 is "undisputedly" constitutional); see also 99-1257 APC Br. 8 ("The court did *not* hold the statute itself unconstitutional."). Significantly, ATA does not contest our showing (99-1257 Pet. 11-16) that the CAA provides EPA with sufficient statutory direction to avoid delegating legislative power. See, *e.g.*, *Mistretta* v.

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*over*estimated the actual cost of their implementation and attainment. See *ibid.*

United States, 488 U.S. 361, 372-373 (1989). Instead, ATA defends the court of appeals' decision on the ground that EPA's "interpretation" of the CAA violates the nondelegation doctrine. See 99-1257 ATA Br. 11; 99-1257 APC Br. 10-11, 13; see also 99-1257 Pet. App. 4a ("we find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power").

Our petition takes specific issue with that proposition. See 99-1257 Pet. 16. The nondelegation doctrine is a check on Congress's grant of legislative powers and not—as the court of appeals and cross-petitioners would have it—a mechanism for controlling an agency's exercise of discretion. See *ibid.* We are hardly alone in that view. See, *e.g.*, 99-1257 Pet. App. 94a (Silberman, J., dissenting from the denial of rehearing en banc) ("Th[e] purpose [of the nondelegation doctrine] is, of course, to ensure that *Congress* makes the crucial policy choices that are carried into law."); *id.* at 98a (Tatel, J., joined by Edwards, C.J., and Garland, J., dissenting from denial of rehearing en banc) ("For purposes of constitutional analysis, we thus have no need to require that EPA state 'a far more determinate basis for decision' beyond the intelligible principle Congress provided in the Clean Air Act".).

We urge the Court to correct that basic conceptual error and, in accordance with its usual practice, return the case to the court of appeals so that the court can conclude its task of properly evaluating EPA's rulemakings under the statutory arbitrary and capricious standard set out in Section 307(d)(9) of the CAA, 42 U.S.C. 7607(d)(9). The Court has no occasion to venture further by undertaking belatedly to decide anew a

question of statutory construction that the court of appeals and Congress properly settled long ago.

ATA presses the Court to go further based on its inaccurate characterization of what the court of appeals decided. ATA argues that "the court below was forced to consider constitutional nondelegation issues because that court had misconstrued the Clean Air Act in *Lead Industries* and subsequent cases." ATA Cross-Pet. 5. ATA's characterization is fantasy. This case generated six opinions on panel review and petition for rehearing and rehearing en banc, and *not a single judge on the District of Columbia Circuit* expressed ATA's view of the case. Rather, the panel majority and dissenting judges treated the nondelegation issue and ATA's statutory issue as distinct and separate questions.

Specifically, the panel majority declared EPA's actions unconstitutional without reference to *Lead Industries*. 99-1257 Pet. App. 4a. The majority directed EPA "to develop a construction of the act that satisfies this constitutional requirement," *ibid.*, and it offered comment respecting EPA's options on remand, observing that "[c]ost-benefit analysis * * * is not available under decisions of this court," *id.* at 14a-15a. But the panel considered ATA's statutory issue as a separate question, and the panel *unanimously* reaffirmed the correctness of *Lead Industries*, *id.* at 19a-21a. ATA did not challenge the panel's reaffirmation of *Lead Industries* through a petition for rehearing en banc. There is no merit to ATA's assertion that the nondelegation issue and the *Lead Industries* issue are "inextricably intertwined." ATA Cross-Pet. 7.

The fundamental question here remains whether the nondelegation doctrine provides a constitutional limitation on an agency's action. See 99-1257 Pet. App. 4a. If we are correct that the nondelegation doctrine imposes

a separation of powers limitation on Congress – and not a limitation on an agency's exercise of administrative discretion—then this Court should reverse the court of appeals' decision and remand the case to that court to reevaluate EPA's actions under the proper legal standard with the care that befits these important rulemakings. If, to the contrary, the court of appeals correctly applied the nondelegation doctrine, this Court should affirm the court's judgment remanding the cases to EPA so that the agency can "develop a construction of the act that satisfies this constitutional requirement." *Ibid.* In either event, there is no reason for this Court to decide ATA's statutory challenge. The nondelegation ruling and that statutory challenge involve two distinct issues—one controversial and one not. They are related only in the inchoate sense that "everything is related to everything else." *California Div. of Labor Standards Enforcement* v. *Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).[15]

2. CBT's challenges to the 24-hour primary NAAQS for $PM_{2.5}$ should be denied because the issues CBT raises were not addressed by the court below. The

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[15] In deference to the Court's certiorari standards, the federal petitioners have limited their petition for a writ of certiorari to the nondelegation and the "Subpart 2" issues. They have not challenged the court of appeals' other adverse rulings, even though those rulings – such as the court's decision that EPA must evaluate the alleged health benefits of smog (99-1257 Pet. App. 44a-49a) – stand on a more dubious footing than the settled question that ATA and APC seek to raise. The federal petitioners, unlike the cross-petitioners here, have limited their petition to issues that have broader importance and independently meet this Court's standards for certiorari. The constitutional and finality issues that the federal petition presents raise fundamental issues that arise in every case in which a court reviews a federal agency's administration of a regulatory program.

court of appeals concluded that its remand of the ozone and $PM_{2.5}$ NAAQS on nondelegation grounds precluded resolution of most of the other challenges before it, including CBT's challenge to the 24-hour $PM_{2.5}$ primary NAAQS. See 99-1257 Pet. App. 4a-5a. There is no warrant for this Court to address an issue that the court of appeals did not reach.[16]

CBT's challenge to the secondary standards for $PM_{2.5}$ should also be denied. The secondary $PM_{2.5}$ NAAQS, like the 24-hour primary $PM_{2.5}$ NAAQS, were remanded to EPA by the court of appeals for reconsideration in light of that court's holding on nondelegation. Thus, the court below did not reach "the main thrust" of CBT's challenge, 99-1257 Pet. App. 56a, and there is no reason

[16] CBT's challenges are, in any event, without merit. CBT's assertion that the 24-hour $PM_{2.5}$ primary NAAQS is inconsistent with EPA's risk findings rests on a misunderstanding of those findings. In challenging the 24-hour $PM_{2.5}$ primary NAAQS, CBT largely assumes that EPA can address the risk from daily or short-term peak exposures only through a short-term standard. To the contrary, EPA found that it could most effectively reduce the risks from both long-term and peak $PM_{2.5}$ concentrations through an annual standard of 15 $\mu g/m^3$, together with a 24-hour standard to address unusual circumstances. 62 Fed. Reg. at 38,669. The studies on which EPA relied in setting the standard demonstrated a statistically significant correlation between 24-hour $PM_{2.5}$ concentrations and health effects in cities with annual $PM_{2.5}$ concentrations greater than about 16 $\mu g/m^3$, but did not show such a correlation in cities with annual $PM_{2.5}$ concentrations below that level. *Id.* at 38,676. Thus in setting the annual standard just below that level, *i.e.*, at 15 $\mu g/m^3$, EPA has addressed the statistically significant association between health effects and 24-hour $PM_{2.5}$ exposures demonstrated by the studies in the record. *Id.* at 38,669-38,671. The 24-hour $PM_{2.5}$ primary NAAQS (65 $\mu g/m^3$) serves as an additional margin of safety for localized or seasonal exposures that might not be adequately controlled by the annual standard alone. *Id.* at 38,671.

for this Court to address questions that the court of appeals did not decide. The court of appeals did decide one narrow issue that CBT raises here. The court concluded, over CBT's objection, that EPA may take into account the mitigating effect of the Regional Haze Program in setting the secondary $PM_{2.5}$ NAAQS.

The CAA specifically provides that the purpose of the Regional Haze Program is to address adverse visibility impacts that remain "*notwithstanding attainment* and maintenance of all national ambient air quality standards." 42 U.S.C. 7470(1) (emphasis added). That provision makes clear that EPA is not required to set the secondary NAAQS at a level that eliminates *all* adverse effects on visibility. There is no reason for this Court to review the court of appeals' ruling, which is clearly correct. EPA acted within the scope of its authority in relying on the Regional Haze Program to mitigate some of the adverse visibility effects associated with $PM_{2.5}$. 99-1257 Pet. App. 57a.

CONCLUSION

The conditional cross-petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 99-1426 and 99-1431

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,
Conditional Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITIONS FILED BY AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*, No. 99-1426, AND APPALACHIAN POWER COMPANY, *et al.*, No. 99-1431

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITIONS FILED BY AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*, No. 99-1426, AND APPALACHIAN POWER COMPANY, *et al.*, No. 99-1431

Citizens for Balanced Transportation, et al.,[1] oppose these cross petitions because they seek to expand the Court's review to decide constitutional arguments that need not be addressed to resolve challenges to the lawfulness of EPA's national ambient air quality standards. The questions presented by U.S. Environmental Protection Agency and other petitioners[2] seeking review of the D.C. Circuit's novel application to an agency decision of the constitutional doctrine that bars the delegation of Congress' law making power, provide no occasion to determine whether, as the American Trucking Association would have it, the Constitution bars EPA's and the D.C. Circuit's longstanding construction of § 109(b) of the Clean Air Act. The Industry petitioners seek to reopen a long settled question of statutory interpretation by asking the Court to review the 1980 decision by the D.C. Circuit Court of Appeals holding that "the [Clean Air Act] and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir.1980). Citizens for Balanced Transportation, et al., oppose these cross petitions because there is no clause of the Constitution

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[1] Citizens For Balanced Transportation, et al., filed a timely Cross Petition, No. 99-1442, supporting the government's petition on the nondelegation question, and asking that the Court also review the court of appeal's failure to apply the proper standard for review in accord with this Court's teaching in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983), requiring an agency to "articulate a satisfactory explanation for its action. . . . ".

[2] American Lung Association, the Commonwealth of Massachusetts and the State of New Jersey.

that requires an agency to consider costs or feasibility in setting standards for the protection of public health when Congress decided not to require the agency to consider such factors.

REASONS FOR REJECTING QUESTIONS PRESENTED BY INDUSTRY PETITIONERS

None of the criteria for granting certiorari are met by the Industry cross petitions. The court of appeals' long-standing holding affirming the EPA Administrator's initial construction of § 109(b) –

1) has not been questioned by a revised construction of the Act by the agency responsible for its implementation;
2) has been consistently applied by the Court below, including the decision below in *American Trucking Associations v. EPA;*
3) is not in conflict with any decision of this Court or any other court;
4) was correctly decided even under the subsequent teaching of this Court in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984), because the Court affirmed the agency's reasonable interpretation of the Act;
5) was consistent with Congress' enactment in 1977 of § 317, 42 U.S.C. § 7617, which intentionally omitted NAAQS from the statutory obligation imposed on EPA to consider an economic impact assessment when setting other standards under the Act; and
6) was ratified by Congress' 1990 decision to enact a new requirement in § 312, 42 U.S.C. § 7612, directing EPA to report the costs and benefits of NAAQS compliance, but not to amend § 109(b) to require EPA to consider costs as a relevant factor in setting or revising NAAQS.

For these reasons, there is no need to review the D.C. Circuit's holding in *Lead Industries*.

Most importantly, there is no need to review *Lead Industries* to avoid reaching a constitutional issue. Indeed, one of the basic flaws in the decision below was the court's determination of the nondelegation issue without first deciding whether EPA's standards were arbitrary and capricious or consistent with law. Had the Court pursued a traditional inquiry into CBT's argument that EPA failed, as in the case of the 24-hour NAAQS for fine particles, to provide a rational basis for its selection of the standards, then there would have been no occasion to reach the constitutional claims on which the decision was based. Granting the Industry cross petitions would perpetuate and compound that unnecessary and inappropriate inquiry. The Industry cross petitions should therefore be denied.

In the interests of conserving the Court's time and petitioners' resources, CBT adopts here, and relies upon, the detailed analysis of these objections to granting the Industries' cross petitions for certiorari filed by the American Lung Association, petitioner in No. 99-1295.

Respectfully submitted,

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No. 99-1426

In The
Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS
AND THE STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

OPPOSITION OF MASSACHUSETTS AND NEW JERSEY TO CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly found, consistent with the Environmental Protection Agency's ("EPA") longstanding and unwavering interpretation, that the Clean Air Act unambiguously requires EPA, in setting national ambient air quality standards for an air pollutant, to consider only the effects on public health or welfare that may be anticipated from the presence of such air pollutant in the ambient air.

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BRIEF IN OPPOSITION FOR PETITIONERS COMMONWEALTH OF MASSACHUSETTS AND STATE OF NEW JERSEY

Petitioners Massachusetts and New Jersey file this brief in opposition to the conditional cross-petitions of American Trucking Associations, Inc., *et al.* ("ATA Cross-Pet.") and Appalachian Power Co., *et al.* ("App. Pwr. Cross-Pet.").

Although the two cross-petitions frame the question presented somewhat differently, both cross-petitions ask this Court to enlarge the set of factors EPA considers in setting National Ambient Air Quality Standards ("NAAQS") under sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408-09. In doing so, cross-petitioners ask this Court to disturb the interpretation of these provisions that has prevailed – in EPA, in the courts, and in Congress – since the provisions were written thirty years ago. The law as to the issues raised by cross-petitionersis so well-settled and consistent, and so plainly correct, that cross-petitioners' challenge to it does not present an issue worthy of this Court's review. Moreover, far from helping this Court to avoid a constitutional issue, the varied and conflicting reinterpretations of the Clean Air Act proferred by cross-petitioners would nourish the very constitutional issue cross-petitioners purport to avoid.

STATEMENT

Massachusetts and New Jersey provided a Statement of the Case in their petition and thus will focus here on matters relevant to the conditional cross-petitions.

1. Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408-7409, direct the Administrator of the EPA to set and periodically revise the NAAQS for a limited subset of air

pollutants. Section 109 defines the NAAQS as standards "the attainment and maintenance of which in the judgment of the Administrator, *based on such criteria* and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (emphasis added). "Criteria" refers to the air quality criteria that section 108 requires the Administrator to issue before setting the NAAQS. These criteria must reflect "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air . . ." 42 U.S.C. § 7408(a)(2). Section 109 provides that NAAQS "may be revised in the same manner as promulgated." 42 U.S.C. § 7409(b)(1).

2. EPA has, beginning in 1971 with the very first NAAQS issued under the then-new Clean Air Act, consistently interpreted the Act to preclude the agency, in setting NAAQS, from considering factors other than the effects on public health or welfare caused by the presence of the relevant air pollutant in the ambient air. National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 8186, 8186 (1971). EPA adhered to this interpretation in the rulemakings at issue in this case. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,683 (1997) ("PM Final Rule").

3. The court below unanimously rejected cross-petitioners' claim that EPA had erred in construing the Clean Air Act as precluding the Agency's consideration of factors other than the effects on public health or welfare caused by the presence of the relevant air pollutant in the ambient air. (Pet. App. 17-20). The panel relied on the circuit's own precedent, which has consistently rejected virtually identical industry claims in more than twenty years of challenges to EPA-promulgated NAAQS. See *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) ("*Lead Industries*"); *American Petroleum Inst. v. Costle*,

665 F.2d 1176 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc. v. EPA*, 902 F.2d 962 (D.C. Cir. 1990). Cross-petitioners did not seek *en banc* review of the question they ask this Court to hear. This Court has repeatedly denied *certiorari* on the issues presented by cross-petitioners (ATA Cross-Pet. 5-6), including denying *certiorari* in *Lead Industries* itself. 449 U.S. 1042 (1980).

REASONS FOR DENYING THE PETITION

In this case, the D.C. Circuit adhered to its longstanding conclusion that the Clean Air Act does not permit EPA to consider factors other than the direct public health or welfare effects of air pollution in setting the NAAQS. This decision creates no conflict either with decisions of this Court or with other decisions of the D.C. Circuit (the only lower court with jurisdiction over nationwide Clean Air Act rules, 42 U.S.C. § 7607(b)(1)). Moreover, Congress has had ample opportunity to reconsider the interpretation of the Clean Air Act embodied in the court's opinion, and has never done so even though it has twice substantially amended the Act, including amending the very provisions at issue in this case. Finally, EPA's construction of those provisions is clearly correct in light of the plain meaning of the relevant statutory language. The well-settled questions presented by cross-petitioners do not, therefore, warrant this Court's review.

1. Cross-petitioners do not claim that the decision below presents a circuit conflict. Nor could they in light of the D.C. Circuit's exclusive jurisdiction to review challenges to EPA's promulgation of NAAQS under the Act (see 42 U.S.C. § 7607(b)(1)) and that court's consistent rulings during the past two decades on the precise issue presented by the cross-

petition.[1] The D.C. Circuit has repeatedly upheld EPA's position that the Clean Air Act permits the Agency, in setting the NAAQS for an air pollutant, to consider only the effects on public health or welfare that may be anticipated from the presence of such air pollutant in the ambient air.[2] And this Court has denied *certiorari* on every occasion that further review has been sought on the issues discussed in the cross-petitions. See *Lead Industries Ass'n v. EPA*, 449 U.S. 1042 (1980); *St. Joe's Minerals Corp. v. EPA*, 449 U.S. 1042 (1980); *American Petroleum Institute v. Gorsuch*, 455 U.S. 1034 (1984); *American Iron and Steel Institute v. EPA*, 498 U.S. 1082 (1991). The lower court in this case merely followed settled, longstanding precedent.

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[1]Cross-petitioners wrongly claim that the D.C. Circuit's decisions in *Lead Industries*, 647 F.2d 1130, adhered to in this case, and in *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"), are inconsistent with each other. (App. Pwr. Cross-Pet. 16; ATA Cross-Pet. 17-18; *see also* Brief of State Respondents in Support of Cross-Petitions 9-13 ("Ohio Brief in Support").) *Vinyl Chloride* itself reconciled its holding with *Lead Industries* (see 824 F.2d 1146, 1158-59), and reasonably so: not only did the two cases involve two different statutory provisions, but they involved two different agency approaches to those different provisions. Of course, even if there were such a split within the circuit, the most appropriate vehicle for resolving it would be *en banc* review, not review in this Court (see *Davis v. United States*, 417 U.S. 333, 340 (1974)), and cross-petitioners declined to seek the former.

[2]See *Lead Industries*, 647 F.2d 1130 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc. v. EPA*, 902 F.2d 962 (D.C. Cir. 1990).

Cross-petitioners nonetheless argue that review is now warranted based on their assertion that the D.C. Circuit's ruling presents a "conflict" with the decisions of this Court. They do not, however, rely on any recent decisions of this Court. They rely instead on three rulings of this Court issued between 16 and 20 years ago, which were the basis of some of the prior unsuccessful efforts at obtaining the Court's review. ATA Cross-Pet. 16-18, citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*"); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); and even *INS v. Chadha*, 462 U.S. 919 (1983).

None of these three cases, moreover, supports cross-petitioners' most recent request for review. There is no merit to the suggestion that the lower court's interpretation of the Clean Air Act is in tension with the plurality opinion in *Benzene* because the court below did not look "through the lens of constitutional avoidance." (ATA Cross-Pet. 16.) Given that cross-petitioners' responses to the petitions for *certiorari* asserted that the D.C. Circuit's invocation of the nondelegation doctrine correctly followed *Benzene* (ATA Resp. 12; *see also* App. Pwr. Resp. 14-15), it is odd that cross-petitioners now criticize the D.C. Circuit for inconsistency with *Benzene*. Nor is cross-petitioners' reliance on *Chevron* any more persuasive: if cross-petitioners (arguing as respondents) are to be believed, the D.C. Circuit's decision was simply a "work-a-day" remand under *Chevron*. (ATA Resp. 14; *see also* App. Pwr. Resp. at 15.) In any event, nothing in *Benzene* or *Chevron* requires or permits a court to distort the language, structure, and history of a statute the way cross-petitioners would have this Court do in this case. Finally, the lower court's reliance on legislative history does not create an inconsistency with *INS v. Chadha*, 462 U.S. 919 (1983), justifying this Court's review. Not only is the court's interpretation of the Clean Air Act amply supported by the plain language and structure of the statute,

quite apart from its legislative history, but reliance on legislative history is certainly not an automatic trigger for *certiorari*, let alone for condemnation. See, *e.g.*, *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 2000 U.S. LEXIS 2195 (March 21, 2000).

Further counseling against this Court's review is the fact that Congress has rejected invitations to reverse EPA's longstanding interpretation by changing the relevant statutory language. See *Lead Industries*, 647 F.2d at 1150, n. 39. Instead, Congress has substantially revised the Clean Air Act twice, and has substantially amended the very provisions at issue here, without questioning the interpretation long embraced by the D.C. Circuit and by EPA.[3] There is simply no reason for this Court to disturb the settled and well-grounded meaning of sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408-09.

2. Moreover, the D.C. Circuit's decision is plainly correct. The language, structure, and history of sections 108 and 109 of the Clean Air Act unambiguously preclude the consideration of factors other than an air pollutant's direct effects on public health and welfare when EPA sets the NAAQS for that pollutant.

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[3]Clean Air Act Amendments of 1977, sec. 401, § 108 (a)(1)(A), 91 Stat. 685, 790-91 (codified as amended at 42 U.S.C. § 7408 (1994)) (amending section 108 to confirm the authority of the Administrator to list criteria pollutants when, "*in his judgment*," they "*may reasonably be anticipated* to endanger public health or welfare") (emphasis added); Clean Air Act Amendments of 1977, sec. 106, § 109, 91 Stat. at 691 (amending section 109 to require the appointment of a scientific advisory committee to assist in reviewing the scientific basis for the NAAQS).

a. Section 109(b)(1) of the Clean Air Act requires NAAQS to be "*based on*" scientific criteria, which themselves must, according to section 108 of the Act, reflect "the latest scientific knowledge" regarding the "effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air . . ." 42 U.S.C. §§ 7409(b)(1) (emphasis added), 7408(a)(2). Section 109(b)(1) also provides that NAAQS must be "requisite to protect the public health," allowing an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). NAAQS "may be revised in the same manner as promulgated." 42 U.S.C. § 7409(b)(1). *See also* 42 U.S.C. § 7409(d)(1).

Thus Congress clearly specified that initial and revised NAAQS may only be "based on" the information developed in the criteria document, and that they must be "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). Where Congress specifies the factors to be considered, it is not up to the courts to introduce additional, unnamed, and unrelated factors into the statutory scheme. See, *e.g.*, *Union Electric Co. v. EPA*, 427 U.S. 246, 256-66 (1976). This point has particular force where, as here, many sections of the statute under consideration explicitly direct the agency's attention to costs and/or feasibility. See 42 U.S.C. §§ 7411(a)(1); 7411(h)(1); 7521(a)(2); 7521(a)(3)(A)(I); 7521(a)(3)(B)(I); 7521(a)(3)(D); 7545(c)(1)(B); 7571(b); 7585(b); 7590(a); *see also Union Electric*, 427 U.S. at 257, n. 5. Where Congress wanted EPA to consider such issues, Congress said so.

The structure of the NAAQS regulatory program confirms this reading of the statute. NAAQS are set by the EPA and implemented by the states. *Union Electric*, 427 U.S. at 249. Before the states develop their plans to implement the NAAQS, estimates of the overall costs of implementation and the distribution of those costs will be most speculative. In addition,

the Clean Air Act was deliberately designed to be a "technology-forcing" statute. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 91 (1975); *Union Electric*, 427 U.S. at 256-59. Given this purpose, it would make little sense to shrink the centerpiece of the Act – the NAAQS program – based on perceived technological infeasibility.

b. For their part, cross-petitioners assiduously avoid the complete language of the Act, and instead offer snippets drawn out of statutory context in order to support their construction of the Act. For example, cross-petitioners argue that because EPA may revise a NAAQS only as "appropriate," EPA may consider costs in the decision whether to revise a NAAQS (App. Pwr. Cross-Pet. at 15) – omitting the fact that the words "*in accordance with section 7408 of this title and subsection (b) of this section*" follow the word "appropriate" in the statute. 42 U.S.C. § 7409(d)(1) (emphasis added). Cross-petitioners also argue that section 108(b)(1) indicates that EPA may consider costs and feasibility in setting NAAQS because this section requires the agency to issue information regarding emission control technologies (App. Pwr. Cross-Pet. at 23) – omitting the fact that section 108(b)(1) by its plain terms distinguishes the information just described from the "criteria" on which the NAAQS are to be based. 42 U.S.C. § 7408(b)(1).

With nothing in the language to support them, cross-petitioners resort to reliance on bits and pieces of irrelevant legislative history. Cross-petitioners Appalachian Power, *et al.*, rely almost exclusively on statements in the 1967 and 1977 legislative record, largely bypassing the legislative history of 1970, the year in which Congress created the NAAQS program. (App. Pwr. Cross-Pet. 5, 6, 19-20, 21, 22.) Cross-petitioners ATA, *et al.*, likewise fix on the legislative history from 1977 rather than that from 1970. (ATA Cross-Pet. 23.) At best, these particular offerings from the legislative history of the

1977 Amendments present a glimpse into the post hoc attitudes of several members of Congress toward the statute that Congress had passed in 1970.[4]

Ironically, perhaps the most telling evidence of the clarity of sections 108 and 109 comes from cross-petitioners' and respondents' briefs. Having deprived themselves of the one interpretation that follows plainly from the language, structure, and history of the Act, cross-petitioners and respondents are quite at a loss to offer a consistent alternative interpretation. They variously argue that the Clean Air Act *permits* EPA to consider factors, such as cost and feasibility, beyond those the agency now considers (ATA Cross-Pet. 22; App. Pwr. Cross-Pet. 20); that the Act *requires* the agency to consider such additional factors (ATA Cross-Pet. 23; App. Pwr. Cross-Pet. 18, 22, 23); that the Act requires EPA to quantify risks before the agency may regulate them (Nat'l Stone Resp. 8-9); and that the Act either requires or permits cost-benefit analysis (ATA Cross-Pet. 26; Ohio Brief in Support 5). Cross-petitioners Appalachian Power, *et al.*, even offer an interpretation of the Act specially designed for cases in which the health effects of various pollution levels are purportedly "indistinguishable."[5]

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[4]The legislative history from 1970 confirms the lower court's, and EPA's, interpretation of the clear language of the Act. See PM Final Rule, 62 Fed. Reg. at 38,684-85.

[5]The question presented by Appalachian Power, *et al.*, rests on a factual premise unsupported by the ruling below – namely, that the health effects caused by ozone at the varying levels considered by EPA are "indistinguishable." (App. Pwr. Cross-Pet. I.) This fact-based argument constituted a major portion of Appalachian Power's arbitrary-and-capricious challenge to the ozone rule in the court below. However, the court did not reach the question whether the rule was arbitrary

The disarray among cross-petitioners and respondents as to the meaning of sections 108 and 109 shows the confusion that results once one's interpretation of a statute is cut loose from the language, structure, and history of the statute.

c. This same confusion also undercuts cross-petitioners' invocation of the canon counseling avoidance of constitutional questions as a basis for reinterpreting the Clean Air Act. (ATA Cross-Pet. I.) That canon plays no role where, as here, the statutory meaning is plain. In addition, the varied and conflicting statutory interpretations proffered by cross-petitioners do nothing to alleviate the constitutional question they have identified. Precisely because cross-petitioners lack any statutory basis for their competing interpretations, they do not identify any discernible statutory criteria for EPA's exercise of discretion under their various interpretations. Nor do they provide any such criteria for reviewing EPA's (permissible or mandatory, it is not clear which one) consideration of the additional factors they identify. Yet, absent such criteria, the constitutional claim they purport to avoid is, in fact, not redressed at all.

In short, cross-petitioners' reliance on a canon of constitutional avoidance is, like the entire cross-petition, no more than a thinly disguised effort to hitch an uncertworthy statutory question to a clearly certworthy constitutional question. Having failed for three decades to persuade Congress,

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and capricious. In the posture in which this case comes to this Court, this Court has no basis for assuming that the factual premise of cross-petitioners' question presented is correct, and thus the question as formulated is not properly presented at this time. The same basic points apply to cross-petitioners' frequent assertions that the risks found by EPA were "theoretical" or "hypothetical." (App. Pwr. Cross-Pet. 16.)

EPA, or the lower courts of the wisdom of their legal or policy claims that the NAAQS should be based on economic costs and feasibility, they now once again invite this Court to revisit this settled matter. Because the lower court's sound rejection of cross petitioners' claim is wholly independent of the important constitutional and statutory issues raised by the petitions, the Court should deny review on the issues raised by the cross-petitions, just as it has on numerous prior occasions. Nothing has changed.

CONCLUSION

The cross petitions for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Cross-Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTRODUCTION

ATA has defended, and will continue to defend, the decision below "on its own terms." *Compare* U.S. Reply 3 *with* ATA Resp. 11-15, ATA Cross-Pet. 7-14. But ATA's cross-petition also shows that the court below invalidated EPA's statutory interpretation on nondelegation grounds primarily because *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), precluded any consideration of the non-health factors that would allow EPA to "'speak to the issue of degree'" in standard-setting. *See* ATA Cross-Pet. 4, 7-12. Logically then, this Court might uphold the D.C. Circuit judgment *overruling* EPA without considering *Lead Industries*. Yet, it cannot *sustain* EPA's interpretation of the Clean Air Act ("CAA" or "Act"), or the regulations based on it, without considering *Lead Industries* and holding that it was correctly decided. *See id.* at 1, 14-26.

EPA's Opposition is dismissive of this logically undeniable point, saying that the decision below and *Lead Industries* are intertwined "only in the haphazard sense that a fishing line might become intertwined with a tree limb." U.S. Opp. 18. According to EPA, this Court need only "correct" the D.C. Circuit's "basic conceptual error" of invoking the nondelegation doctrine as the basis for its decision. *Id.* at 19. EPA leaves the impression that it is mainly this doctrinal issue that is of importance – and that the decision below would have been more acceptable had the D.C. Circuit only ruled against EPA on *Chevron I* grounds (as this Court did against the FDA in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1305 (2000), or held EPA's interpretation "unreasonable" under *Chevron II* (as in *AT&T Corp. v. Iowa Utilities*, 525 U.S. 366, 397-98 (1999)).

But this Court's job is to review holdings, not to provide advisory opinions on what EPA terms "conceptual errors." As this Reply demonstrates, the court of appeals reversed on the grounds that it did only because the most obvious options available for use as "intelligible principles" – "cost-benefit analysis," as well the "significant risk" test embraced by this Court in *Industrial Union Department, AFL-CIO v. American*

Petroleum Institute, 448 U.S. 607 (1980) ("*Benzene*") – were ruled out by *Lead Industries*. It is therefore entirely artificial to suggest, as EPA does, that the nondelegation issue can somehow be divorced from the enterprise of statutory interpretation and considered in isolation. *See* U.S. App. 14a.

Moreover, as demonstrated below, the *Lead Industries* issue – whether the Act absolutely precludes any consideration of non-health factors in standard-setting – is plainly worthy of *certiorari* in its own right. Not even EPA can deny that decision's importance, nor seriously defend its reasoning. In particular, *Lead Industries* cannot survive the first step of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (under which EPA acknowledges it must be defended), given the non-exclusionary statutory text and the interpretative norm recently reiterated by the D.C. Circuit, that "only where there is '*clear congressional intent to preclude consideration of cost*'" will courts find agencies "barred from considering costs." *See Michigan v. EPA*, No. 98-1497, 2000 WL 180650, at *12 (D.C. Cir. Mar. 3, 2000) ("*State of Michigan*") (emphasis added), *pet'ns for reh'g filed* (4/20/2000). *See* Part I below.

Just as *Lead Industries* is inevitably bound up in the D.C. Circuit's nondelegation holding, so too any statutory interpretation of the Act's standard-setting provisions by this Court must be keenly sensitive to nondelegation concerns. The nature and extent of Congress' delegation of authority to an agency has always figured prominently in statutory construction, whether that consideration is invoked expressly, as in this Court's *Benzene* decision, or implicitly, as in *Iowa Utilities* and other recent decisions. The importance of nondelegation concerns, expressed both as construction canons and as part of the construction of the Act itself, will therefore continue should this Court accept review of any form of the Government's first question presented. In that event, this Court's essential task would be to decide whether, contrary to

Lead Industries, consideration of non-health factors in EPA standard-setting is warranted. *See* Part II below.

I. *LEAD INDUSTRIES* IS BOTH CLOSELY TIED TO THE DECISION BELOW AND WORTHY OF *CERTIORARI* IN ITS OWN RIGHT.

EPA's Opposition claims that this cross-petition raises "unrelated issues involving particular details of the underlying rulemakings." U.S. Opp. 2. It describes as sheer "fantasy" any notion that "'the court below was forced to consider constitutional nondelegation issues because that court had misconstrued the Clean Air Act in *Lead Industries* and subsequent cases.'" *Id.* at 20 (quoting ATA Cross-Pet. 5). But one need look no farther than the court of appeals' opinion itself to confirm the central role *Lead Industries* played in producing the nondelegation holding below.

The D.C. Circuit faulted EPA's interpretation of the Act's standard-setting provisions because of that interpretation's failure to "speak to the issue of degree," or provide a "cut-off point." U.S. App. 5a, 7a. As the means to correct that flaw, the court then asked: "What sorts of 'intelligible principles' might EPA adopt? Cost-benefit analysis, mentioned as a possibility in [*International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991) ("*Lockout/Tagout I*")], is not available under decisions of this court. Our cases read [CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1)] as barring EPA from considering any factor other than 'health effects relating to pollutants in the air.'" U.S. App. 14a-15a (citing *Lead Industries* and progeny).

The court went on to suggest that EPA might develop "the rough equivalent of a generic unit of harm that takes into account population affected, severity, and probability" – somewhat akin to the "significant risk" test adopted by this Court in *Benzene*. *Id.* at 16a. But even so, the court acknowledged that similar approaches devised under the

Medicaid program employed an indirect cost analysis in order to allocate health resources over a range of different medical conditions. *Id.* at 17a-18a. If this indirect consideration of costs could not be avoided, the court suggested, the *Lead Industries* straightjacket might force EPA to "report to the Congress . . . and seek legislation ratifying its choice." *Id.* at 18a. In short, the D.C. Circuit hoped that EPA could develop an "intelligible principle," but admitted that, because of *Lead Industries*, the success of that venture was not entirely assured.

That *Lead Industries* effectively led to the nondelegation holding in this case is further underscored by the D.C. Circuit's discussion of the very similar problem in *Lockout/Tagout I*. There, the court rejected the Department of Labor's interpretation of the OSH Act based on a nondelegation analysis nearly identical to the one below. As *Lockout/Tagout I* explains, cost-benefit analysis is merely a shorthand for rational decisionmaking in everyday life – or "what Benjamin Franklin referred to as a 'moral or prudential algebra.'" 938 F.2d at 1321. As so defined, "cost-benefit analysis entails only a systematic weighing of pros and cons," *id.* – a traditional form of reasoned decisionmaking, the absence of which ATA maintains would raise nondelegation and other concerns, especially unless expressly ruled out by Congress. While this was "a permissible interpretation" in *Lockout/Tagout, id.*, *Lead Industries* interprets Section 109(b) to preclude it here, thus requiring resort to alternative intelligible principles along the lines suggested by the decision below. *See* U.S. App. 14a-18a.

Rather than grapple with the obvious barrier that *Lead Industries* poses for resolving the appellate court's very real nondelegation concerns, EPA and the other cross-respondents pretend that this Court might somehow grant *certiorari* but still avoid any inquiry into statutory construction, supposedly because ATA concedes that the Act is "undisputably" constitutional. *See* ALA Opp. 3; U.S. Opp. 18-19. To be sure, ATA, like the court below, accepts that the Act is constitutional, provided it is *construed* in a manner that imposes

real limits on agency discretion, promotes rational decisionmaking, and permits meaningful judicial review. Needless to say, this so-called concession hardly amounts to "recharacteriz[ing] the court of appeals' decision in ways that obfuscate the issues." U.S. Opp. 5. The court of appeals could not have been clearer that it was invalidating "*the construction* of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue." U.S. App. 4a (emphasis added). In this regard, it expressly relied on *Benzene* as an example of how the need to defuse nondelegation concerns could give rise to a statutory *construction* providing the missing "*intelligible principle*" – a principle that, under *Chevron*, it is the agency's job to develop in the first instance. *See, e.g., id.* at 5a; 75a-76a.

Viewed from this perspective, *Lead Industries* might well preclude the very sort of bounded and rational decisionmaking necessary for EPA to solve the appellate court's nondelegation concerns – surely the best possible reason for granting ATA's cross-petition. But EPA is equally wrong to suggest that *Lead Industries* "raise[s] no issue that would independently warrant review." U.S. Opp. 5. *Lead Industries* on its own terms squarely poses the question whether EPA may (or even must) impose countless billions of dollars in economic costs without regard to whether those costs, in total or at the margin: (1) address "significant" health risks as that test has been applied by agencies since *Benzene*; (2) are necessary to provide an "adequate" "margin of safety," *cf. NRDC v. EPA*, 824 F.2d 1146, 1158 (D.C. Cir. 1987) (*en banc*) ("*Vinyl Chloride*"); or (3) are even roughly commensurate with the predicted health benefits, *see generally Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991). *See* ATA Cross-Pet. i, 22-26.

These interrelated issues are of manifest importance in their own right and are therefore independently worthy of *certiorari*. *Cf.* Sup. Ct. R. 10. Indeed, this Court granted *certiorari* on analogous questions in the much less economically significant context of the OSH Act. *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981); *Benzene*. As the Court,

speaking through Justice Brennan, explained, *certiorari* was granted in *American Textile* expressly "to resolve th[e] important question" of whether an agency must "enact the most protective standard possible to eliminate a significant risk of material health impairment," or must instead choose a standard that "reflects a reasonable relationship between the costs and benefits associated with the Standard." 452 U.S. at 494-95.

EPA's only response to this obvious, albeit alternative, ground for granting ATA's cross-petition boils down to the claim that *Lead Industries* was correctly decided. *See* U.S. Opp. 9-16. But even EPA must concede that *Lead Industries*, although decided before *Chevron*, speaks in mandatory terms that can only be defended under *Chevron* step one. *Id.* at 9; U.S. App. 19a ("[T]he *Lead Industries* decision was made in *Chevron* step one terms"). Under a *Chevron* step-one test, however, it is barely plausible to argue that Congress "has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. To the contrary, the non-exclusionary Clean Air Act text – "protect the public health" with "an adequate margin of safety" – permits various readings, including many allowing consideration of the non-health factors that are now precluded from consideration by *Lead Industries* and its progeny.

Significantly, EPA's Opposition omits any mention of *State of Michigan*, which strongly suggests how the D.C. Circuit might construe CAA § 109(b)'s open-ended text if it – like this Court – were free to interpret the Act afresh. *State of Michigan* involved a pollution-transport provision that prohibits emission of "any air pollutant in amounts which will . . . contribute significantly" to nonattainment of the national standards. CAA § 110(a)(2)(D)(i), 42 U.S.C.§ 7410(a)(2)(D)(i). Confronted with this statute, the court ruled: "It is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *Id.* at *12 (quoting *Vinyl Chloride*, 824 F.2d at 1163; citing additional cases). From this, the court went on to express the "general view that preclusion of cost consideration requires a rather express congressional direction." *Id.* (citing authorities).

Applying that canon, *State of Michigan* explained that the provision before it, like other provisions interpreted in previous cases, involves "[a] mandate directed to some environmental benefit . . . phrased in general quantitative terms ('ample margin of safety,' 'substantial restoration,' and 'major'), and contains not a word alluding to non-health tradeoffs." 2000 WL 180650, at *12 (discussing, *inter alia*, *NRDC v. EPA*, 937 F.2d 641, 643-46 (D.C. Cir. 1991); *Vinyl Chloride*, 824 F.2d at 1163). "[I]n each case we found that in making its judgments of degree the agency was free to consider the costs of demanding higher levels of environmental benefit. So too here." *Id.* *State of Michigan* thus confirms in the strongest possible terms that, notwithstanding what EPA says, *see* U.S. Opp. 8, the D.C. Circuit does indeed "lack confidence" in the reasoning of *Lead Industries*.

Equally telling, however, is the complete absence of any EPA response to ATA's extended textual and structural deconstruction of the *Lead Industries* holding. *See* ATA Cross-Pet. 18-22. EPA thus makes no mention at all of statutory text except for mistakenly arguing that "Section 108(a)(2) . . . *limits* the kind of information to be included in the 'criteria' to 'the latest scientific knowledge' about effects on health and welfare 'which may be expected from the presence of such pollutant in the ambient air.'" U.S. Opp. 10 (emphasis added). In fact, as ATA's cross-petition demonstrates, there is no such limitation. Rather, the statute merely specifies certain items that are to be included in an analytical criteria *document* without in any way *limiting* the analysis to those items. *See* ATA Cross-Pet. 19-20.

EPA's heavy reliance on *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), only confirms this latter point. *See, e.g.*, U.S. Opp. 11-12. The statutory provision at issue there, in marked contrast to Section 108, specifically states that EPA "shall" approve a State Implementation Plan so long as eight specific requirements are satisfied. *See* CAA § 110(a)(2), 42 U.S.C. § 7410(a)(2). That list of decisional criteria, combined with the mandatory "shall," makes clear that the statutory list is intended as exclusive. But as the D.C. Circuit has ruled, *Union Electric*

has no relevance where, as here, Congress has not "limit[ed] specifically the factors the Administrator may consider." *Vinyl Chloride*, 824 F.2d at 1158.

EPA's final claim, that Congress somehow ratified the *Lead Industries* interpretation in the 1977 and 1990 amendments to the Act, is even more unpersuasive than EPA's other weak arguments, since EPA itself concedes that Congress did not amend the relevant statutory provisions in any respect. *See* U.S. Opp. 14 ("Congress did not change the substantive criteria for setting and revising NAAQS" in 1977); *id.* at 15 ("Congress . . . did not change the legal standard on which NAAQS are based" in 1990). As the D.C. Circuit has already held respecting the 1977 amendments, "we certainly cannot construe Congress' failure to act in these circumstances as amounting to ratification," since Congressional inaction can result from any number of causes. *Vinyl Chloride*, 824 F.2d at 1162 & n.10. *Compare Brown & Williamson*, 120 S. Ct. at 1305 (ratification argument made where, unlike here, Congress affirmatively took "incompatible" action).

In the end, the most that EPA could (but does not) say is that *State of Michigan* fails to mention *Lead Industries* at all, confirming that, whatever its merits, the D.C. Circuit "has long viewed the matter as settled." U.S. Opp. 8-9. The D.C. Circuit may indeed be willing to treat *Lead Industries* as a precedential leper – diseased but untouchable – especially given the resources it has devoted to the issue over the years. *See, e.g, Vinyl Chloride*, 824 F.2d at 1158-59. But the fact remains that leaving *Lead Industries* uncorrected makes vastly more difficult EPA's task of solving the nondelegation problem that drove the decision below. For that reason, as well as because *Lead Industries* is surpassingly important and wrongly decided, this Court should grant ATA's cross-petition.

II. NONDELEGATION CONCERNS SHOULD CONTINUE TO INFLUENCE CONSTRUCTION OF THE ACT IF *CERTIORARI* IS GRANTED.

EPA is plainly wrong to argue that *Lead Industries* bears no relationship to the appellate court's nondelegation holding. But it would be equally wrong to assume that this Court, although not constrained by *Lead Industries*, could construe Section 109(b) without regard to nondelegation concerns.

EPA unabashedly admitted below that it followed "no generalized paradigm," that its decision "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that it was "largely judgmental in nature." 62 Fed. Reg. 38,856, 38,883 (July 18, 1997) (emphasis added). Faced with similarly aggressive agency interpretations, this Court has never hesitated to deploy the nondelegation canon and like considerations in order to reject agency statutory constructions that leave to agencies unbounded authority to shape regulatory programs in ways that Congress would not have reasonably expected. *Cf. Brown & Williamson*, 120 S. Ct. at 1314 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."); *Department of Commerce v. House of Representatives*, 525 U.S. 316, 343 (1999) (rejecting argument that Congress "would have decided to reverse course on [sampling for census purposes] by enacting only a subtle change in phraseology"); *MCI Telecommunications Corp. v. AT&T Corp.*, 512 U.S. 218, 221 (1994) (rejecting FCC interpretation of the term "modify" as permitting the FCC effectively to abolish all tariff-filing requirements). Along these very lines, just last term in *Iowa Utilities*, this Court used statutory interpretation doctrines to reject an agency construction that would otherwise have resulted in unbounded agency discretion. *See* 525 U.S. at 386-90; Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1431-42 (2000) (treating *Iowa Utilities* and *ATA* as examples of the "new delegation doctrine").

Moreover, in *Benzene*, this Court rejected on nondelegation grounds an OSHA interpretation of a standard-setting statute that, as even EPA admits, contains an express "feasibility" limitation. U.S. Opp. 16. Notwithstanding that feasibility limitation, this Court used the nondelegation canon to reject OSHA's interpretation on grounds that it would grant OSHA "unprecedented power over American industry" to "impose enormous costs that might produce little, if any, benefit." 448 U.S. at 645. Here, the Act lacks any such limitation. Deployment of the nondelegation canon is therefore all the more necessary, lest EPA be granted even greater discretion to impose costs that are orders of magnitude higher – or as the court below put it, unbounded discretion to "send industry not just to the brink of ruin but hurtling over it." U.S. App. 12a.

As ATA will demonstrate should this Court accept review, this boundless authority EPA claims would contradict not only the statutory text, but also basic notions of the agency's proper role, as reflected in foundational constitutional and administrative law principles. Under these principles, as confirmed by the holding of the *State of Michigan* case, consideration of non-health factors is the norm in interpreting public health provisions, absent "clear congressional intent" to the contrary. *See* 2000 WL 180650, at *12. Indeed, EPA itself admitted as much in its *State of Michigan* brief: "[W]here, as here, the statute is silent regarding the factors EPA may or may not consider, it is generally permissible for the Agency to consider other relevant factors," such as costs. EPA Br. at 53 in *State of Michigan v. EPA*, No. 98-1497 (D.C. Cir.). Unless and until Congress amends the Act, consideration of non-health factors is warranted, just as EPA argued it was in *State of Michigan*.

CONCLUSION

EPA's complete silence concerning whether this cross-petition is necessary apparently signals its agreement that a cross-petition is not needed to preserve the *Lead Industries* issue. *See* ATA Cross-Pet. 27-30. Nevertheless, ATA urges that the cross-petition be granted or held for the reasons stated above.

Respectfully submitted,

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Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

AMERICAN LUNG ASSOCIATION,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

(*Case Captions Continued on Inside Cover*)

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Mercatus Center at George Mason University is a nonprofit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3), whose Regulatory Studies Program ("RSP") is dedicated to advancing knowledge of administrative regulations and their impact on society.* RSP submitted comments to the Environmental Protection Agency on the proposed national ambient air quality standards for ozone and particulate matter that are the subject of the Petitions herein. Its comments focused on the inadequacy of the scientific foundation of the proposed standards and on the disproportionate risks they would impose on the general population, both because ozone provides direct health benefits that should be considered, and because the extraordinary cost of achieving the standards would adversely affect public health.

The consent of the parties to the filing of this *amicus curiae* brief has been obtained and is filed with the Clerk of the Court.

ARGUMENT

I. INTRODUCTION AND BACKGROUND

The central issue in the petitions for a writ of certiorari filed separately by the Environmental Protection Agency

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* Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

("EPA"), the American Lung Association ("ALA"), and Massachusetts and New Jersey ("States") is whether the court of appeals properly interpreted the nondelegation doctrine when it reversed and remanded the National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter because EPA's interpretation of Section 109 of the Clean Air Act ("CAA") stated no "intelligible principle" on which the levels were based.

Petitioners rely primarily on three contentions to justify review. First, they argue that as a matter of public policy, the ozone and particulate matter rules are fundamentally sound and of "immense practical importance to the health of the American public." EPA Pet. 9; see State Pet. 26-28; ALA Pet. 15-17. Second, they assert that the lower "court's decision represents a radical departure from settled law respecting the nondelegation doctrine." EPA Pet. 9; see *id.* 11-19. Third, they charge that the lower court's ruling would improperly "expand the role of courts in reviewing agency action." *Id.* 9.[1]

None of Petitioners' arguments is meritorious. First, the EPA rules will not improve public health. They are

[1] We do not address the issue raised by EPA but not by other petitioners, namely, whether EPA had taken final action and, thus, whether the Subpart 2 implementation issues were ripe for review. EPA Pet. 19-21. Contrary to the EPA petition, we believe it is clear beyond reasonable argument that the EPA's action here—"two *final* EPA rules establishing revised National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone," EPA Pet. 2 (emphasis added)—"alters the legal regime to which the action agency is subject." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (biological opinion isued by Fish & Wildlife Service under Endangered Species Act constitutes final agency action). The EPA rulemaking "implicate[s] the viability of massive regulatory programs which rely upon both the validity and enforceability of the revised ozone and PM NAAQS." State Pet. 26. The EPA petitioners dispute the application of the finality/ripeness tests but identify no conflict among the circuits on this issue or confusion in the criteria to be applied.

based on highly uncertain evidence and ignore important countervailing health considerations.

Second, the lower court did not misunderstand the nondelegation doctrine. It applied the doctrine in a traditional and reasonable fashion, focusing on the absence of any intelligible standard in the agency's interpretation of the CAA and identifying how the agency might construe the statute to save it from being found invalid.

Third, the appeals court did not apply the nondelegation doctrine to reverse a Congressional delegation to the EPA, nor did it, itself, reinterpret the statute to conform to its views of the constitutional norm. Instead, it took a far less intrusive approach, consistent with this Court's decision in *Chevron*, of remanding the matter to the agency for EPA to interpret the CAA consistent with the "intelligible principles" requirement of the nondelegation doctrine.

Under the Clean Air Act, EPA is to set NAAQS at levels "requisite to protect the public health" with an "adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). In the case of ozone and particulate matter ("PM"), EPA's evidence suggests that there is no threshold below which either pollutant would not pose health threats. However, EPA failed to identify specific standards or measurable factors consistent with the CAA as the basis for the NAAQS levels it selected. It interpreted the CAA as allowing it to choose any point along a "linear nonthreshold"[2] continuum and to claim that the

[2] The linear, nonthreshold dose-response model that EPA uses in its analysis relates the predicted change in health effects to a change in the concentration of PM or ozone. Unlike other chemicals regulated by EPA under this section of the CAA, EPA has no scientific evidence of a threshold concentration below which PM or ozone will not have health effects. This is the nonthreshold aspect of the model. The linear aspect of the model assumes that regard-

selected point provides an adequate margin of safety—without regard to whether that margin could be satisfied at a less stringent level.

Because the linear nonthreshold model attributes health benefits to each further reduction in ozone and PM, no matter how clean the air already may be, and without regard to the overall effect on public health, EPA's interpretation of the CAA would allow it to set the level for each at zero. It relies upon "policy judgments" to justify its selected standards. Thus, any level chosen by EPA—"any point between zero and a hair below the concentrations yielding London's Killer Fog," Pet. App. 13a—is automatically permissible under the agency's reading of the CAA because, according to EPA, the statute imposes no limits on its policy judgment.

The basic fault in EPA's misguided interpretation of the CAA, and thus of its NAAQS rules, derives from the D.C. Circuit's decision in *Lead Indus. Assn. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), holding that § 109 of the CAA prohibits the consideration of "any factor other than 'health effects relating to pollutants in the air'" in setting NAAQS levels. *See* Pet. App. 15a. This reading of the CAA is not supported by the text, structure, context or legislative history of the Act, see ATA Cross-Pet. 14-15, or by rational policy analysis. Protecting public health necessarily involves consideration of a broad range of factors, including trade-offs between different health effects and the costs of implementing a standard, because large costs themselves can have negative public health consequences.

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less of the overall concentration of ozone or PM to which an individual is exposed, a one unit change in that concentration will have the same marginal effect.

II. EPA'S OZONE AND $PM_{2.5}$ RULES ARE LIKELY TO HARM PUBLIC HEALTH BECAUSE THEY IGNORE TRADE-OFFS AND OTHER HEALTH EFFECTS

EPA's revised NAAQS would reduce the allowed level of ground-level ozone by about 10 percent and regulate very fine particles ($PM_{2.5}$) for the first time. It argued that these revisions were necessary to protect the public from respiratory health effects, especially asthma. Contrary to EPA's assertions that these rules would make a significant contribution to public health, the standards have little scientific merit, were not endorsed by EPA's own scientific advisors, and were based on unduly narrow health considerations. EPA has presented no evidence that the new standards are achievable, and even if they were, EPA cannot demonstrate that they are likely to be more protective of public health than current NAAQS levels. In fact, the opposite is true.

For the ozone standard, EPA's Clean Air Scientific Advisory Committee ("CASAC"), a legislatively-established body of independent experts which provides advice to EPA on scientific and engineering issues, concluded that "there is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public health." CASAC Letter to Carol Browner *re: Ozone* (November 30, 1995) Ozone JA 238. Moreover, the majority of members on the panel who expressed an opinion preferred a level less stringent than that proposed by EPA. *Id.*

Similarly for the PM standard, CASAC could find no consensus for selecting "the level, averaging time, or form of a $PM_{2.5}$ NAAQS." CASAC Letter to Carol Browner *re: Particulate Matter* (June 13, 1996) PM JA 3162. Only 2 of the 21 scientists on CASAC were willing to

endorse a general range as stringent as the range adopted in EPA's $PM_{2.5}$ standard. *Id.* 3165.

EPA ignored other important information relevant to public health in setting the ozone and PM levels. For example, it acknowledged that, due to ozone's screening effect on harmful ultraviolet-B radiation, the reduction in ozone levels mandated by the NAAQS will increase malignant and nonmelanoma skin cancers and cataracts. EPA, *Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers* (Draft) (September 1994) (Cupitt, Larry T.) Ozone JA 3089-3104. Nonetheless, EPA ignored these data in setting the ozone standard. In uncontradicted evidence submitted to EPA, the Department of Energy projected that a 10 ppb reduction in ozone concentrations, as required by the ozone rule herein, would result in 25 to 50 new melanoma-caused fatalaties, 130-260 incidences of cutaneous melanoma, 2,000-11,000 new cases of nonmelanoma skin cancer, and 13,000 to 28,000 incidences of cataracts each year. Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995) Ozone JA 258-59. These negative health effects of the ozone standard dwarf EPA's projected positive health effects, which do not include any reduction in deaths. *See* Susan E. Dudley & Wendy L. Gramm, *EPA's Proposed Ozone Standard May Harm Public Health and Welfare*, 17 Int'l J. of Risk Analysis 403 (August 1997).

EPA itself concedes that the costs of the new ozone regulation will far exceed its benefits, but asserts that under *Lead Industries* the agency may not consider implementation costs when setting NAAQS. *EPA Ozone Rule*, 62 Fed. Reg. 38,855, 38878 (July 18, 1997); *Regulatory Impact Analysis*, Ozone JA 2924, 2934 (July 16, 1997). Yet mounting research shows that regulatory costs do affect public health because such costs represent foregone opportunities to improve health and safety—e.g., disease prevention, better diets and improved sewage treatment. *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 23 (1993) ("deprivation of real income itself has adverse health effects, in the form of poorer diet, [and] more heart attacks"). Studies linking income and mortality find that every $15 million decline in incomes results in one statistical death. Randall Lutter, John F. Morrall, III, W. Kip Viscusi, *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 Economic Inquiry 599 (October 1999). Applying this analytical framework to the ozone and PM rules herein, the Mercatus Center's Regulatory Studies Program estimates that full compliance could exceed $100 billion per year and increase mortality by over 6,500 deaths per year (not including the increase in melanoma deaths from UV-B exposure). *See RSP Comments in EPA Ozone/PM Rulemaking* (submitted March 12, 1997) (available at www.gmu.edu/mercatus/).

This disregard for the "wealth-health" effect is a direct result of the D.C. Circuit decision in *Lead Industries* barring consideration of costs because the CAA "makes no mention of such factors." 647 F.2d at 1149 n.37. Both EPA and the lower court interpreted *Lead Industries* as limiting the NAAQS rulemaking to direct health effects and as not permitting consideration of the costs and their relationship to benefits imposed by the rule and of whether the costs imposed by the rule will result in a net reduction in human health or a net increase in lives lost. ATA Cross Pet. 6. However, as the ATA Cross Petition shows, the ruling in *Lead Industries* is based on an erroneous reading of the CAA, has been extended improperly beyond its basis, is contrary to the principles and rationale of this Court's ruling in *Benzene* (discussed *infra* pp. 13-14), and should be reconsidered as urged by Respondents below. ATA Cross Pet. 14-18.

III. REQUIRING EPA TO IDENTIFY "INTELLIGIBLE PRINCIPLES" DERIVED FROM THE CLEAN AIR ACT IS CONSISTENT WITH ESTABLISHED PRECEDENTS

This case does not require application of the nondelegation doctrine to overturn the CAA or otherwise to interfere with broad legislative delegations of administrative authority. It also does not require that the doctrine be revised before being applied as a prophylactic canon of construction. Finally, the Court need not consider whether the CAA's defining terms—that the NAAQS standards must "protect the public health" with an "adequate margin of safety," CAA § 109(b)(1)—are unconstitutionally unconfined and therefore should be overturned.

Rather, the issue here is a narrow one. The court below limited its ruling and held only that it is the agency's responsibility to interpret the statute, if possible, in a manner that is consistent with the principles of the nondelegation rule. What the court said is that EPA is *not* free to read the CAA terms as setting virtually no definable limits on the agency's authority when setting NAAQS for ozone and PM, while ignoring a more specific construction that could provide a principled basis for the agency's rules.

We believe that the analysis applied by the court below is correct and consistent with numerous cases decided since 1935 and 1936 when the doctrine was last applied by this Court to directly invalidate a Congressional enactment. Administrative agencies are obliged to interpret their authority to avoid unchanneled delegations of discretion to the agency. To rule otherwise is to raise the specter of "delegation[s] running riot," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring), and to disregard the first operative sentence of the Constitution that "[a]ll legislative

Powers herein granted shall be vested in a Congress of the United States." U.S. Constitution, Art. I, § 1; *see also id.* Art. I, § 8.

A. Under the Nondelegation Doctrine, Congressional Legislation Must Be Interpreted, If Possible, as Providing Guidance for Measuring the Limits and Lawfulness of Agency Action

The core requirement of the nondelegation doctrine is undisputed by Petitioners. EPA Pet. 13. It establishes that legislative authority delegated by Congress to the executive must state "intelligible principles," *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904), by which the agency is given a "primary standard" to guide its action. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see Clinton v. City of New York*, 524 U.S. 417, 484-96 (1998) (Breyer, J., dissenting). It is satisfied where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

That the nondelegation doctrine is rarely applied to invalidate legislation does not mean that it has been abandoned or that it is without continuing substantial influence. *See South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) (invalidating Indian Reorganization Act authorizing Interior Secretary to acquire lands in trust for tribes because Act provided no "intelligible principles" for determining when that authority could be exercised), *vacated & remanded on change in petitioner's position*, 519 U.S. 919, 920-23 (1996). It has an "important and continuing 'shadow' impact" on the reading and review of legislative delegations. P.

Strauss, T. Rakoff, R. Schotland & C. Farina, *Cases and Comments on Administrative Law* 92 (9th ed. 1995).

For example, in *Touby v. United States*, 500 U.S. 160 (1991), the Attorney General's broad discretion to temporarily add or remove psychoactive drugs from the "schedules" of prohibited or regulated controlled substances was upheld. In upholding this authority, however, the Court relied heavily on two concessions by the Government which more narrowly confined the Attorney General's discretion. First, it acknowledged that a drug could not be added to Schedule I (the most harmful category) without first being subject to additional testing. Second, the provision freeing temporary scheduling orders from judicial review did not preclude a defendant facing criminal charges from asserting a challenge to the temporary scheduling order as a defense to the prosecution. *See id.* 170 (Marshall, J., concurring).

Thus, the nondelegation doctrine does not mean that Congress cannot delegate broadly or allow executive agencies substantial discretion. And there are numerous examples, which Petitioners trumpet, EPA Pet. 12 n.5, of facially open-ended statutory "standards" that delegate to an agency the power to determine what are "excessive profits," "fair and equitable" prices, "just and reasonable rates," and "unfair methods of competition" which have been upheld. But in every case, the Court has identified specific limits or compelling constitutional reasons justifying the delegation before upholding the statute or rule.

What Petitioners fail to recognize is that these open-ended statutory standards have been upheld only after finding an exceptional circumstance (e.g., relying on the President's extensive war powers or authority to conduct foreign affairs) justifying the delegation or because the executive discretion was bounded by precedent, recognized principles implicit in the statute, or other similar restrictions. For example, *Yakus v. United States*, 321 U.S. 414 (1944) and *Lichter v. United States*, 334 U.S. 742 (1948) are emergency wartime measures where "broad discretion . . . may be essential." *Id.* 779. *Fahey v. Mallonee*, 332 U.S. 245, 249-53 (1947) upheld broad powers to oversee banking because a long history of such regulation had established specific common law standards which guided the regulators. And *Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J.) upheld non-wartime wage and price controls only after finding that the administrative authority was confined by price control precedents and after incorporating other restrictions including APA procedures and opportunities for judicial review in the regulatory program.

There also are even more cases where administrative action was upheld only after the Court "reinterpreted" the statute to find an implied condition limiting the facial agency authority. *E.g., Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (*Benzene*); *National Cable Television Assn. v. United States*, 415 U.S. 336, 342-43 (1974) (narrowing basis for FCC to set cable television fees); *Zemel v. Rusk*, 381 U.S. 1 (1965) (reading areas of restrictions on passports as limited by "prior administrative practice"); *Kent v. Dulles*, 357 U.S. 116 (1958) (reading passport authority narrowly to deny Secretary of State power to refuse a passport on grounds of political belief). The typical application of the nondelegation doctrine, in fact, is by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States, supra* at 374 n.7; *see also Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222-23 (1989).

B. The Clean Air Act Could Satisfy the Nondelegation Doctrine If It Were Interpreted as Implying Limits on EPA's Authority to Set NAAQS Levels

The lower court here similarly found EPA's interpretation of the CAA inadequate because the agency had failed to find any limit on its authority to select the levels at which the ozone and PM standards were to be set. The D.C. Circuit held that § 109 and related sections of the Act must be construed to provide an "intelligible principle" that guides the exercise of agency discretion. Finding that EPA had failed to define such a standard in the CAA, the court remanded the rules for "EPA to develop a construction of the act that satisfies this constitutional requirement." Pet. App. 4a.

The Government's Petition now claims to have found a standard in EPA's interpretation of the CAA because the Act "requires EPA to develop the [limiting substantive] 'criteria' " in accordance with established rulemaking and judicial review procedures in § 307(d), 42 U.S.C. § 7607(d), and as derived from the Act's legislative history which references "adverse effects." EPA Pet. 13-15 & n.8. However, this description of EPA's approach has no support in the record and is inconsistent with EPA's position below. This contrived effort to seek shelter under the *Benzene* ruling fails because the term "adverse" tells us nothing about the degree of harm which must be found. To say that something must be "unfavorable" or "harmful" [3] does not tell us how harmful, or that the harm must be substantial or significant. In any case, EPA's rule cannot be upheld on a view not adopted by EPA but advanced for the first time by counsel before this Court. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appel-

[3] *Webster's New World Dictionary* 21 (College Edition 1964) (defining "adverse" as something "unfavorable, harmful").

late counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated by the agency itself.").

The situation here is closely analogous to *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (plurality opinion) (*Benzene*), where this Court reversed an OSHA rule issued by the Secretary of Labor that would have imposed stringent measures to minimize worker exposure to benzene, a cancer-causing chemical. According to the Court plurality, the rule could not be justified by the statutory terms requiring employers to protect their workers "to the extent feasible" from harm due to toxic substances because feasibility was not, at least on its face, a sufficiently limiting requirement. However, after reviewing the organic act, its terms and context, the plurality determined that the "feasibility" requirement was adequate because it required the Secretary to make a finding that the preexisting situation created a "significant risk" (which the OSHA rule could then alleviate). With that addition, the impermissibly standardless facial authority was held to satisfy the nondelegation doctrine. That is, the plurality narrowed the feasibility standard in the statute by interpreting it as including a significant risk test. It then remanded the matter to the agency for reconsideration of the rule under the revised interpretation of its statutory authority.[4] As here,

[4] The *Benzene* plurality became a majority with the vote of then-Justice Rehnquist who would have invalidated the statute as an impermissible delegation. He found the statute's "to the extent feasible" standard a "mirage" and unconstitutional because Congress had delegated to the Secretary the "fundamental" policy decision of "where on the continuum of relative safety [the Secretary] should draw his line." 448 U.S. at 675, 681, 687-88. Under its interpretation of § 109 of the CAA, EPA claims the same discretion here.

however, the facially open-ended grant of authority to the agency was not upheld and the agency was afforded the opportunity to apply the corrected standard in developing its rule.

The lower court similarly remanded the rule to the agency for revision in accordance with a standard consistent with the nondelegation doctrine. However, it took a less intrusive path than that outlined in *Benzene*. It found only that, as applied, EPA's interpretation of CAA § 109 allows it untrammeled discretion that would, if not corrected, violate the nondelegation doctrine. But the court did not interpret the statute itself or tell the agency what the criteria must be under its terms. It merely held that, as interpreted by EPA, § 109 sets no limit on the agency's authority, and that under this view any level identified in the NAAQS would satisfy the CAA. Under the *Benzene* precedent, the reviewing court could have examined the statute for itself, determined its meaning (at least if it found that the intent of Congress was clear, see pp. 14-16 *infra*), and directed the agency to revise the rule in accordance with this interpretation (i.e., in a way that properly applied the reinterpreted "protect public health" with an "adequate margin of safety" test). Instead, the court below took the more limited step of remanding the matter to EPA with the direction that the agency reinterpret § 109 consistent with the nondelegation doctrine (if possible) and that under this revised understanding it identify a more specific foundation for setting the ozone and PM NAAQS.

C. Requiring the EPA to Identify the Ranking Criteria for Determining the Level of Nonthreshold Pollutants Is Consistent with *Chevron*

The ruling below that EPA, rather than the reviewing court, should determine the meaning of § 109 consistent

with the nondelegation doctrine, is also required by recognized standards for judicial review of agency action. Under *Chevron v. NRDC*, 467 U.S. 837, 842-44 (1984), courts are to defer to reasonable agency interpretations of statutes that do not clearly reveal Congress' intent on the precise issue in question. Just as EPA was allowed in *Chevron* to determine whether Congress meant EPA's regulation of "stationary sources" of pollution to be measured solely by each individual source or on a plant-wide basis, here it is for EPA to interpret the meaning of § 109 and to identify criteria consistent with Congress' intent.

The identification of the numerical equivalent or degree of an "adequate margin of safety" for nonthreshold pollutants is essentially a legislative task consistent with EPA's authority to issue legislative rules such as NAAQS standards. Thus, it is particularly appropriate that the agency be directed to fill in the meaning of this statutory standard through legislative rulemaking. *See Hoctor v. USDA*, 82 F.3d 165 (7th Cir. 1996) (Posner, C.J.) (numerical requirements are inherently "arbitrary" and involve legislative judgments which agencies are better positioned than courts to make). EPA's interpretation shall be upheld if reasonable, including therein that as interpreted the statute satisfies the nondelegation doctrine.

Enforcement of the nondelegation doctrine, to require that the NAAQS levels be consistent with Congress' stated purpose of protecting the public health with an adequate margin of safety, is consistent with sound policy. Not only are agencies quasi-legislative bodies and accountable to the people through the President's authority over them, but also EPA is the body best positioned to determine what Congress intended when it approved the provisions of § 109. 467 U.S. at 865-66. In addition, under *Chevron*, the agency interpretation is not "carved in stone" and can be modified as necessary to meet changing circum-

stances. It has greater flexibility and can move more quickly to revise the interpretation of the underlying criteria when change is required. And as long as that change is plausible and justified by reasons for the change, it will not be disturbed on judicial review. *Id.* at 863-64.

IV. REVIEW OF LEGISLATIVE RULES UNDER THE "ARBITRARY AND CAPRICIOUS" TEST OF THE APA IS NO SUBSTITUTE FOR THE NONDELEGATION DOCTRINE

Finally, review of agency action under the "arbitrary and capricious" test under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), is no substitute for application of the nondelegation doctrine to control standardless discretion. The nondelegation doctrine, as applied by the court of appeals, requires that EPA determine Congress' intent when it prescribes NAAQS to protect the public health with an adequate margin of safety. As long as EPA's interpretation of the Congressional intent confines administrative discretion within understandable bounds, it will not be disturbed by the nondelegation doctrine on review. And as long as that interpretation by EPA is reasonable—i.e., a permissible and reasonable interpretation of § 109—it will be upheld under *Chevron*.

On the other hand, application of the arbitrary and capricious test under § 706(2)(A) of the APA requires that the particular NAAQS levels selected by EPA must reflect a reasoned decision. That is, the facts must be supported by sufficient evidence before the agency, and the inferences drawn from them as well as the policy rationale and ultimate conclusions must be adequately explained and justified. *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The nondelegation doctrine looks to the interpretation given the Congressional statute and asks whether the authorized administrative action is confined by intelligible standards. By contrast, the arbitrary and capricious test does not look at the statutory authority and its definiteness. Rather, it examines the administrative action itself and asks whether the rule is the product of reasoned decision making. Thus, the two requirements complement each other; but one is not a substitute for the other.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied and, alternatively, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 99-1426

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.*,*

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors other than health effects relating to pollutants in the air, given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

PARTIES TO THE PROCEEDINGS

Cross-Petitioners are: American Trucking Associations, Inc., Chamber of Commerce of the United States, National Coalition of Petroleum Retailers, Burns Motor Freight, Inc., Garner Trucking, Inc., Genic Trucking Line, Inc., National Automobile Dealers Association, National Association of Manufacturers, National Small Business United, The American Portland Cement Alliance, The Glouster Company, Inc., Non-Ferrous Founders' Society, Equipment Manufacturers Institute, American Farm Bureau Federation, and American Road and Transportation Builders Association.

None of these cross-petitioners has any parent corporations, and no publicly traded company owns 10 percent or more of any of these cross-petitioners' stock.

Respondents are: Carol M. Browner, the Administrator of the Environmental Protection Agency, and the Environmental Protection Agency.

The following additional entities participated as parties in the court of appeals: Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association), American Chemistry Council (formerly Chemical Manufacturers Association), American Forest and Paper Association, American Iron and Steel Institute, American Lung Association, American Petroleum Association, American Public Power Association, Appalachian Power Company, Atlantic City Electric Company, Baltimore Gas and Electric Company, James Bassage, Carolina Power & Light Company, Centerior Energy Corporation, Central and South West Services, Inc., Central Hudson Gas & Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, Central Power & Light Company, CINergy Corporation, Citizens for Balanced Transportation, Cleveland Electric Company, Columbus Southern Power Company, ComEd Company, Consumers Energy Company, Dayton

Power & Light Company, Delmarva Power & Light Company, The Detroit Edison Company, Duke Energy Company, Duquesne Light Company, Edison Electric Institute, FirstEnergy Corporation, Florida Power Corporation, Michael Gregory, Idaho Mining Association, Illinois Power Company, Indiana Michigan Power Company, Indianapolis Power & Light Company, Jacksonville Electric Authority, Kansas City Power & Light Company, Judy's Bakery, Kennecott Energy and Coal Company, Kennecott Corporation, Kennecott Services Company, Kentucky Power Company, Kentucy Utilities Company, Louisville Gas and Electric Company, Madison Gas and Electric Company, Commonwealth of Massachusetts, David Matusow, Brain McCarthy, Meridian Gold Company, The State of Michigan, Midwest Ozone Group, Minnesota Power, Monongahela Power Company, National Association of Home Builders, National Indian Business Association, National Mining Association, National Paint and Coatings Association, National Petrochemical & Refiners Association, National Rural Electric Cooperative Association, National Stone Association, Nevada Mining Association, The State of New Jersey, Newmont Gold Company, Northern Indiana Public Service Company, Oglethorpe Power Corporation, The State of Ohio, Ohio Edison Company, Ohio Power Company, Ohio Valley Electric Corporation, Oklahoma Gas & Electric Company, PacificCorp, Plains Electric Generation & Transmission Cooperative, Inc., Phoenix Cement Company, The Potomac Edison Company, Potomac Electric Power Company, PP&L Resources, Public Service Company of New Mexico, Richard Romero, Salt River Project Agricultural Improvement & Power District, Small Business Survival Committee, South Carolina Electric & Gas Company, Southern Company, Tampa Electric Company, Toledo Edison Company, Union Electric Company, United Mine Workers of America, AFL-CIO, Virginia Power, Western Fuels Association, West Penn Power Company, The State of West

Virginia, West Virginia Chamber of Commerce, and Wisconsin Electric Power Company.

The following participated as *amici curiae* in the court of appeals: Representative Tom Bliley, Senator Orrin G. Hatch, Connecticut, New Hampshire, New York, and Vermont.

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INTRODUCTION

Two decades ago, the D.C. Circuit ruled in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148, 1153-54 (D.C. Cir. 1980), that the Environmental Protection Agency ("EPA" or "the Agency") must ignore all factors "other than health effects relating to pollutants in the air" in setting National Ambient Air Quality Standards ("NAAQS"). Pet. App. 15a (internal quotation omitted). That decision was wrong when decided and remains wrong to this day. The text of Clean Air Act ("CAA" or "Act") section 109(b)(1), a host of surrounding statutory provisions, and the Act's overall purposes all belie the notion that Congress intended to prohibit EPA from weighing *all* relevant factors in setting air-quality standards. Now, the same erroneous *Lead Industries* interpretation threatens to do more harm than good by apparently sanctioning new ozone ("O_3") and particulate matter ("PM") standards that EPA must concede (ozone) or that quite possibly (PM) have costs that outweigh their predicted health benefits.

The court below invalidated both of EPA's standards on constitutional nondelegation grounds, but only because it believed *Lead Industries* precluded EPA from setting standards based on a commonsense weighing of benefits and costs. Under *Lead Industries*, that decision was surely correct. But this Court need not reach constitutional nondelegation issues at all if it rejects *Lead Industries* and interprets the Act as contemplating the weighing of various pros and cons, including the supposed "non-health" factors presently embargoed under *Lead Industries*. Besides being supported by the statutory text, that outcome will further Congress' aim of protecting "public health" and promote reasoned EPA decisionmaking, while also facilitating effective Executive Branch and Congressional oversight of EPA's NAAQS under Executive Order 12,866 and recently-enacted statutory provisions.

OPINIONS AND ORDERS BELOW

The final EPA rules on review are reported at 62 Fed. Reg. 38,652 and 62 Fed. Reg. 38,856. The opinion of the court of appeals (Appendix to the Government's Petition ("Pet. App.") 1a-69a) is reported at 175 F.3d 1027. The opinions on the petitions for rehearing (Pet. App. 70a-101a) are reported at 195 F.3d 4.

EPA's rules and Regulatory Impact Statement have been lodged with the clerk. The other record materials cited herein may be found in the D.C. Circuit joint appendices for the ozone and PM cases ("OJA" and "PMJA," respectively).

JURISDICTION

The court of appeals entered its judgment on May 14, 1999. On October 29, 1999, timely petitions for panel rehearing were granted in part and denied in part, with suggestions for *en banc* rehearing denied in their entirety. The Government's petition for *certiorari* was timely filed on January 28, 2000, and the conditional cross-petition was timely filed on February 28, 2000. Supreme Court Rule 12.5 and 28 U.S.C. § 1254(1) provide the basis for jurisdiction.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutory and regulatory provisions are central to this case: the Clean Air Act, the Unfunded Mandates Reform Act, and Executive Order 12,866, relevant portions of which are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

A. The Clean Air Act

This case requires the Court to construe for the first time Clean Air Act section 109, the core provision of the Nation's air pollution control program. CAA § 109, 42 U.S.C. § 7409. Under section 109, EPA must set National Ambient Air Quality Standards for the "criteria" pollutants listed under section

108(a)(1) of the Act, 42 U.S.C. § 7408(a)(1). Once EPA sets a NAAQS for a pollutant, the Act's Title I requires that all States enforce that NAAQS against the stationary emission sources within their borders. *See* CAA §§ 110, 171 *et seq.*, 42 U.S.C. §§ 7410, 7501 *et seq*. In addition, the NAAQS levels set by EPA heavily influence the setting of mobile source emission standards by EPA (and certain States) consistent with the Act's Title II. *See* CAA § 201 *et seq.*, 42 U.S.C. § 7521 *et seq*. These stationary sources include essentially all businesses, large and small, plus facilities operated by federal, State, and local governments. Mobile sources include, not just cars, trucks, trains, and airplanes, but also smaller emission sources, including boats, snowmobiles, and even lawn mowers. The NAAQS levels chosen by EPA, more so than any other federal regulatory decisions, pervasively impact the Nation's economy.

NAAQS are formulated by a lengthy process consisting of a series of discrete steps. EPA first develops an "air quality" "criteria document" for "each air pollutant . . . emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and which "results from numerous and diverse mobile or stationary sources." CAA § 108(a), 42 U.S.C. § 7408(a). After these criteria documents are reviewed by a scientific advisory committee established by section 109(d) of the Act, known as the Clean Air Scientific Advisory Committee or "CASAC," EPA proposes primary and secondary NAAQS, and these also are reviewed by CASAC. *See* CAA § 109(d), 42 U.S.C. § 7409(d). The primary NAAQS established by EPA must be set at levels "requisite to protect the *public health*" with "an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1) (emphasis added). The secondary NAAQS must be set at levels "requisite to protect the *public welfare*." CAA § 109(b)(2), 42 U.S.C. § 7409(b)(2) (emphasis added).

Following promulgation of a NAAQS, EPA designates every geographic area in the nation (known as an "air quality

control region") as "attainment," "nonattainment," or "unclassifiable." CAA § 107(d), 42 U.S.C. § 7407(d). Each nonattainment area is then "classified" based on "factors such as the severity of nonattainment in such area and the availability and feasibility of . . . pollution control measures" for the area, and then, based on that classification, it is assigned an attainment date. *See* CAA § 172(a)(1, 2), 42 U.S.C. § 7502(a)(1, 2) ("Subpart 1"). Primary responsibility for meeting the attainment deadlines falls to the States, through the adoption and enforcement of State Implementation Plans ("SIPs"). *See* CAA § 110(a), 42 U.S.C. § 7410(a). Additionally, the 1990 amendments to the Act establish a specific plan directed at reducing ozone levels nationwide and eventually solving the intractable nonattainment problems for that pollutant that have persisted since the setting of the first NAAQS in 1971. Under that statutory plan, each ozone nonattainment area is assigned a classification based on the extent of its noncompliance with the ozone air-quality standards set by EPA in 1979, as well as a specific attainment date based on those classifications. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) ("Subpart 2").

B. The 1996 Rulemakings

In the early 1990s, EPA initiated proceedings to reconsider the NAAQS for ozone, originally set in 1971 and revised in 1979, and PM, originally set in 1971 and revised in 1987.

1. The Ozone Rulemaking

Ground-level ozone, often called smog, is formed through the reaction of volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx") in the air, with the highest concentrations usually occurring during sunny, hot summer days. *See* 62 Fed. Reg. 38,856, 38,858 (July 18, 1997). Ozone levels are enhanced by human activity, but ozone also occurs naturally since both NOx (a product of burning) and VOCs (compounds emitted by vegetation) are present in nature.

According to EPA, peak background (*i.e.*, natural) levels of ozone generally range from 0.3 to 0.5 parts per million ("ppm"), and vary from region to region. *See* OJA 1830 (EPA's Ozone Staff Paper).

Elevated ozone levels are associated with various respiratory problems (ranging from discomfort to severe respiratory constriction) that can compound asthma and other lung ailments. EPA first addressed ozone in 1971 when it set a one-hour photochemical oxidant NAAQS at a level of 0.08 ppm, not to be exceeded more than once annually in each air quality control region. *See* 36 Fed. Reg. 8,186 (Apr. 30, 1971). While technically covering a broader category of compounds, compliance with the photochemical oxidant standard was judged by measuring ozone alone. States were required to meet this standard by 1975, but as of 1977, most regions of the country were far from compliance. *See* National Research Council, RETHINKING THE OZONE PROBLEM IN URBAN & REGIONAL AIR POLLUTION 4 (1991) ("RETHINKING OZONE"). In 1979, EPA partially responded by reevaluating the health evidence on which the original standard had been based and revising the maximum one-hour reading (now renamed the ozone NAAQS) upward to 0.12 ppm. *See* 44 Fed. Reg. 8,202 (Feb. 8, 1979). Congress also extended the deadline for compliance until 1982 for most areas, and until 1987 for areas not expected to be able to meet the 1982 deadline. *See* RETHINKING OZONE at 4. Ozone levels declined significantly after 1979, but most large metropolitan areas were still not in NAAQS compliance by 1990. *See* OJA 1823 (Ozone Staff Paper); RETHINKING OZONE at 4; Pet. App. 32a. Accordingly, Congress in the 1990 Amendments established the current Subpart 2 attainment schedule, which sets varying compliance deadlines, extending to 2010. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1); Pet. App. 32a.

In 1992, EPA began its periodic, five-year review of the ozone NAAQS by updating the section 108 ozone air quality

criteria ("the Criteria Document"). *See* 57 Fed. Reg. 38,832 (Aug. 27, 1992). Once review of that document was completed, EPA staff prepared an "Assessment of Scientific and Technical Information" (the "Ozone Staff Paper") that synthesized the Criteria Document's technical information and made recommendations to the Administrator. *See* OJA 1790-2293. The Ozone Staff Paper recognized that most ozone health effects are transient and reversible, and that there is "only limited, suggestive evidence" that "[a]n increase in daily mortality [is] associated with O_3 exposure." *Id.* at 1870. Specifically, while "[s]everal efforts have been made to find associations between long-term O_3 exposure and chronic respiratory dysfunction and disease," these "associations between O_3 exposure and chronic health impacts have not been sufficiently demonstrated in humans." *Id.* at 1871; *see also id.* at 1870. The Staff Paper suggested adoption of a revised ozone NAAQS between a 0.07 and a 0.09 ppm daily maximum eight-hour ozone level, based on three-year averages of somewhere between the second- to the fifth-highest annual ozone concentration. *See id.* at 1974-77. (As the Staff explained, a 0.09 ppm level averaged over eight hours is roughly equivalent to the current 0.12 ppm level averaged over one hour. *See* 62 Fed. Reg. at 38,856, 38,858.) In so doing, the Paper predicted that the Administrator's selection among these broad options would require a "policy judgment," since exposure to ozone presents "a continuum of risk," as opposed to a threshold below which adverse health effects cease to occur. OJA 1971-72, 1976.

CASAC reviewed both the Criteria Document and the Staff Paper. CASAC agreed that, because "ozone may elicit a continuum of biological responses down to background concentrations," "the paradigm of selecting a standard at the lowest-observeable-effect level and then providing an 'adequate margin of safety' is no longer possible." OJA 237. Moreover, this "continuum" is such that "there is no 'bright line' which distinguishes any of the proposed standards (either

the level or the number of allowable exceedances) as being significantly more protective of health." *Id.* at 238. "For example, the differences in the percent of outdoor children . . . responding between the present standard and the most stringent proposal . . . are small and their ranges overlap for all health endpoints." *Id.* CASAC accordingly was reluctant to recommend any specific standard to the Administrator. *See id.* Acknowledging that the issue is not scientific, several CASAC members went on to express what they termed "'personal' preferences," with four favoring a standard of at least 0.09 ppm, three favoring 0.08 ppm, and one favoring a range of 0.08-0.09 ppm. *See id.*

In announcing the final standard, the Administrator stated both that "it is likely that O_3 may elicit a continuum of biological responses down to background concentrations" and that "a zero-risk standard is neither possible nor required by the Act." 62 Fed. Reg. at 38,863. She agreed that "there is no break point or bright line that differentiates between acceptable and unacceptable risks," but chose a 0.08 ppm standard over a 0.09 ppm standard because "[t]he general population as well as children and asthmatics would breathe cleaner air as a direct result of . . . the proposed standard." *Id.* at 38,864, 38,868. The Administrator "recognize[d]," however, that there was merit to "the views of those who argue that similarly large improvements in public health protection would result from a standard set at 0.07 ppm as compared to the proposed standard, such that, based on the same reasoning, the evidence warrants a standard set at 0.07 ppm." *Id.*

The Administrator offered three reasons for not going that far. *First*, no CASAC member had expressed a "'personal' preference" for a 0.07 ppm standard. *See* 62 Fed. Reg. at 38,868. *Second*, "[t]he most certain O_3-related effects . . . are transient and reversible (particularly at O_3 exposures below 0.08 ppm), and the more serious effects . . . are less certain." *Id.* *Third*, the Agency noted that "a 0.07 ppm level would be

closer to peak background levels." *Id.* In her Response to Comments document, the Administrator stated that peak background levels vary from region to region, and are generally in the range of 0.03 to 0.05 ppm. *See* OJA 173-77.

Rulemaking commenters argued that selection of any NAAQS level would be arbitrary without consideration of the costs of achieving compliance. The Administrator rejected this point, saying that the Agency and the D.C. Circuit had previously "interpreted section 109 of the Act as precluding consideration of the economic costs or technical feasibility of implementing NAAQS in setting them." 62 Fed. Reg. at 38,878. As for constraints on her discretion, the Administrator asserted that she was free to select any standard within the proposed range, and that her decision was "largely judgmental in nature" and need follow "no generalized paradigm"; nor need she even decide "what risk is 'acceptable'" through quantification "or any other metric." *Id.* at 38,883. As for whether she needed to follow a consistent standard-setting approach or provide a definite meaning to key statutory terms, the Administrator said that she "is not limited to any single approach to determining the margin of safety and may, in her judgment, choose a two-step approach, or perhaps some other approach, depending on the particular circumstances confronting her in a given NAAQS review." *Id.*

One thing the Administrator did not (and could not) say was that compliance costs and similar data were unavailable to illuminate the consequences of her decision. EPA endeavored in this case, as it had over the years, to keep cost data and other types of countervailing evidence—specifically, all evidence other than medical data showing adverse health consequences of pollution—out of the criteria development and CASAC review process. For instance, EPA refused to permit CASAC to review scientific literature showing that ground-level ozone, like stratospheric ozone, has beneficial effects in shielding the public from harmful ultra-violet radiation. *See, e.g.*, OJA 255-

71, 2666, 2676, 2759, 2849, 3089. The United States Department of Energy ("DOE"), attempting to impress the significance of these studies on CASAC, testified that revising the ozone NAAQS in the range proposed by the EPA Staff Paper would produce an estimated 2,000-11,000 additional cases of skin cancer per year, 130-260 additional cases of melanoma (including 25-30 deaths per year), plus 28,000 additional cataract cases annually. *Id.* at 255-71. DOE stressed that these detrimental health effects are "at least as well established as the relationship between ozone concentrations and lung disease." *Id.* at 257. A study by Office of Management and Budget staff members similarly concluded that the "adverse health effects of . . . EPA's more stringent NAAQS may be similar in magnitude to the respiratory-related beneficial effects of such an O_3 reduction." *Id.* at 2759, 2764; *see also id.* at 3089. CASAC members expressed interest in this issue, and EPA conceded that DOE's concern "could be big." *Id.* at 267. Nevertheless, EPA concluded that these data were legally beyond the bounds of consideration. *See id.* at 210.

Similarly, CASAC was forbidden by the Administrator from considering the data on compliance costs assembled in response to Executive Order 12,866 (President Clinton). Those data, prepared by EPA's economic consultants, estimated that the costs of bringing all areas of the country into compliance with the revised ozone NAAQS by 2010 would be $9.6 billion per year. By comparison, EPA predicted that the benefits would range from $1.5 billion to $8.5 billion annually. Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule (July 16, 1997) ("RIA") at ES-11, ES-17. The RIA estimated that an interim step—"partial attainment"—would cost $1.1 billion annually, with benefits in the range of $0.4 to $2.1 billion per year. *Id.* at ES-12, ES-17.

The difference between the high and low ends of EPA's benefits ranges is accounted for almost entirely by benefits that the RIA said could arise from preventing certain cases of "premature mortality." *See* RIA at ES-17 ("Mortality benefits represent about 90% of the high end benefit estimates."). But the CASAC-reviewed Staff Paper found no persuasive evidence of any such mortality effects. *See supra*, at 6. To resolve this inconsistency, the RIA cited subsequent studies, not analyzed in the Staff Paper or reviewed by CASAC, which were said to "document a possible relationship between ozone and premature mortality." RIA at 12-15. In the parallel PM rulemaking, however, EPA stated it could *not* rely on such unreviewed studies, "based on its long-standing practice of basing NAAQS decisions on studies and related information included in the pertinent air quality criteria and available for CASAC review." 62 Fed. Reg. at 38,862. In any event, EPA ultimately acknowledged "substantial uncertainty" on this point. *Id.* Once these mortality-reduction benefits and certain PM-related benefits are excluded, *see* RIA 12-15, EPA's estimate of the costs of full compliance exceeds its benefits estimates six times over ($9.6 compared to $1.5 billion). *See, e.g.*, ES-11, ES-17.

EPA's cost estimates changed substantially between the draft and final RIAs. EPA derived final cost estimates by assuming that all reasonably available control technologies with an annual cost per ton of emissions reductions of $10,000 or less would be used. *See* RIA at 7-7. The Agency further determined that attainment of the revised ozone NAAQS would require a 2,529 ton reduction in daily NOx emissions, and a 3,455 ton reduction in daily VOC emissions. *See id.* at 7-10. The Agency next estimated that the nation could achieve 22-24 percent of this NOx reduction target and 37-43 percent of the EPA VOC reduction target with technologies that satisfy the $10,000 cost cap, and deemed these reductions "partial attainment." *See id.* at 7-9. When the Agency then estimated the cost of full compliance, it again assumed that attainment

costs for the remainder of the required reductions (comprising the bulk of all required reductions) also would not exceed $10,000 per ton—even though all identifiable technologies costing less than that amount were already accounted for in the "partial attainment" figure. *See id.* at 9-5.

Because there is no empirical basis for EPA's $ 10,000 per ton cost cutoff, EPA conceded that it "has much less confidence in these cost estimates" than it does in its partial attainment estimates. RIA at ES-12. That caveat is seconded by a recent study asserting that EPA's full-attainment cost estimates assume an "implausibly high rate of technological progress." Randall Lutter, *Is EPA's Ozone Standard Feasible?*, Joint Center for Regulatory Studies at 7 (December 1999) (emphasis added); *see also* Darrell A. Winner & Glen R. Cass, *Effect of Emissions Control on the Long-Term Frequency Distribution of Regional Ozone Concentrations*, 34 Environ. Sci. & Technol. 2612, 2617 (June 15, 2000). While the effect of EPA's $10,000 cost cutoff was not apparent until the final RIA, the President's Council of Economic Advisors reached a comparable conclusion when it projected that EPA's ozone NAAQS would cost between $11.6 billion and $60 billion, compared to benefits of $200 million to $1 billion. *See* Memorandum from Alicia Munnell, CEA, to Art Frass, OMB, dated 12/13/96 ("CEA Memo") (cited in Stephen Huebner & Kenneth Chilton, *EPA's Case for New Ozone & Particulate Standards: Would Americans Get Their Money's Worth?*, Center for the Study of American Business Policy Study 27 (1997) ("*Huebner & Chilton*").

2. The PM Rulemaking

Unlike ozone, particulate matter is not a single substance. PM is instead the "generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes." 62 Fed. Reg. 38,652, 38,653 (July 18, 1997). These particles originate from both manmade and natural sources and may be either

emitted directly or formed in the atmosphere through transformations of gaseous emissions, including VOCs, NOx, and sulfur oxides ("SOx"). *Id.* The particles vary in size, a fact that EPA deems important both because particles' size "determines their behavior in the respiratory system," and because it determines their "atmospheric lifetime," which is "a key consideration in assessing health effects information because of its relationship to exposure." PMJA 1914 (PM Staff Paper). EPA has explained that "[t]he chemical and physical properties of PM vary greatly with time, region, meteorology, and source category, thus complicating the assessment of health and welfare effects." 62 Fed. Reg. at 38,653.

EPA has believed for years that, taken as a whole, PM is associated with respiratory and cardiovascular problems, including premature mortality. *See* 62 Fed. Reg. at 38,656. The initial PM NAAQS, issued in 1971, targeted airborne particles up to 45 micrometers in size, particles commonly referred to as total suspended particulate, or TSP. *See* 36 Fed. Reg. 8186 (Feb. 8, 1971); PMJA 1909 (Staff Paper). In 1987, EPA changed the "indicator" of PM from TSP to PM_{10}, which encompasses particles with a mean aerometric diameter less than or equal to 10 μm.

The rulemaking that produced the PM standards in this case occurred "under a highly-accelerated, court-ordered schedule," 62 Fed. Reg. at 38,654 & n.3 (citing *ALA v. Browner*, CIV-93-643 (D. Ariz. Oct. 6, 1994)), that had EPA struggling to complete both its PM Criteria Document and its PM Staff Paper. Echoing the Criteria Document, the PM Staff Paper stated that it is "important to emphasize the unusually large uncertainties associated with establishing standards for PM relative to other single component pollutants for which NAAQS have been set." PMJA 2153. The Staff Paper went on to explain that "[w]hile severe effects at the high concentrations of air pollution in the historical episodes are widely accepted as being causally related, there is less consensus as to the most

appropriate interpretation of studies finding associations of health effects with ambient levels of PM below the current NAAQS." *Id.* at 1993. Moreover, "[t]he majority of the evidence concerning health effects of PM exposure comes from epidemiological studies," which measure statistical correlation but not necessarily causation. *Id.* The Staff Paper found this point significant because "it has proven to be difficult to separate individual effects of multiple pollutants" in certain PM studies, raising the possibility that observed correlations might be due to "confounding" factors, not PM. *Id.* at 2002-03.

Further complicating matters, the Staff Paper explained that "available . . . information yields no demonstrated biological mechanism(s) that can explain the associations between ambient PM exposure and mortality and morbidity. . . . Thus, any discussion of possible mechanisms linking ambient PM exposures to mortality and morbidity effects is necessarily limited to hypotheses derived from animal or human studies conducted at exposure levels of PM constituents far higher than found in ambient air." PMJA 1952. The Staff Paper thus concluded that "there is an urgent need to expand ongoing research on the mechanisms by which PM . . . may cause adverse health effects." *Id.* at 1959.

The most serious of the health effects noted by the Staff Paper is a "small but significant increas[e] in mortality and morbidity in some sensitive populations at concentrations below the levels of the current ambient standards for PM." PMJA 2019. However, "it is reasonable to expect that some of the mortality associated with short-term pollution is occurring in the weakest individuals who might have died within days even without PM exposure." *Id.* at 1972. The Staff Paper thus cautioned that "it is not possible to confidently estimate quantitatively" the extent to which lives are actually shortened. *Id.* at 1974. Here again, the Paper recommended that "[m]ore research is needed." *Id.* at 2156.

The Staff Paper recommended establishing separate standards for fine and coarse PM. Fine PM consists of particles measuring between approximately 0 and 3 μm in diameter; coarse PM consist of particles between approximately 1 and 10 μm. PMJA 2127. The Paper acknowledged that "the epidemiological data providing a direct comparison of the health effects of fine and coarse particles are quite limited in comparison to that of PM_{10} (which contains both coarse and fine mode fractions)." *Id.* at 2020. It speculated nonetheless that fine particles "are a better surrogate for that fraction of ambient PM that is most clearly associated with the health effects observed in community air pollution studies at levels below the current standards." *Id.* at 2049. It also asserted that fine particles are potentially more dangerous to public health because they penetrate deeper into the respiratory system. *See, e.g., id.* at 1914.

As with ozone, the PM Staff Paper declined to recommend specific standards, saying instead that the ultimate choice of a PM standard is a "policy" decision. PMJA 2136. PM presents a "continuum of exposures," such that "attempting to identify 'lowest observed effects levels' and adding margins of safety below such levels is not an appropriate approach in this case." *Id.* at 2134-35. Moreover, "[r]elative to other single pollutants for which NAAQS have been set, establishing appropriate ranges of levels for $PM_{2.5}$ [fine PM] standards involves unusually large uncertainties." *Id.* at 2135. In considering this "continuum," the PM Staff Paper (like the Ozone Staff Paper) did not take into account any offsetting health or non-health factors. *See id.* at 2134-25.

After reviewing the Criteria Document and Staff Report, CASAC recommended that EPA retain the current PM_{10} NAAQS and establish a $PM_{2.5}$ NAAQS. PMJA 3162. But it reached "no consensus on the level, averaging time, or form of a $PM_{2.5}$ NAAQS." *Id.* CASAC instead provided the Agency with a table setting forth the disparate views of its members.

CASAC's cover letter stated that the table "appears to defy further characterization," but "[p]art of this diversity of opinion can be attributed to the accelerated review schedule" ordered by the Arizona district court. *Id.* at 3163. CASAC, like EPA's Staff Paper, stressed that "[t]he Agency must immediately implement a targeted research program to address . . . unanswered questions and uncertainties," in order "to avoid being in a similar situation when the next PM NAAQS review cycle is under way." *Id.* at 3163-64; *see also id.* at 3142-43.

According to the table transmitted by CASAC, only two of the 21 panelists endorsed an annual $PM_{2.5}$ standard as low as the 15 $\mu g/m^3$ standard ultimately adopted by EPA, while eight of the 21 opposed establishing an annual $PM_{2.5}$ standard at all. PMJA 3165. The majority of members opposing the low $PM_{2.5}$ standard chosen by EPA "were influenced, to varying degrees, by the many unanswered questions and uncertainties regarding the issue of causality." *Id.* at 3163. CASAC was especially critical of epidemiological studies, since that evidence "is not unambiguous" given that "[t]he risk factors being reported are not large and they have relatively large uncertainties." *Id.* at 3140. CASAC also emphasized that "[i]t is of paramount importance to know whether some, most, or all of the deaths are advanced by only one or several days." *Id.* at 3141.

EPA's final rule acknowledged the great "uncertainty in the characterization of health effects attributable to exposure to ambient PM." 62 Fed. Reg. at 38,655. Based primarily on epidemiological studies, however, the Administrator determined that the existing PM NAAQS was insufficient from a public health standpoint. *See, e.g., id.* at 38,655. The Administrator agreed that there is no known causal mechanism whereby PM levels below the existing NAAQS could harm public health. *See id.* at 38,656. She also acknowledged that the health effects at issue might be caused by only certain types of particles, not PM generally. *See id.* at 38,667. Despite these "significant uncertainties," she determined that there is an

"adequate basis for regulatory decision making at this time." *Id.* at 38,655.

The Administrator recognized in selecting a fine PM standard that, as with ozone, she faced both uncertainties and "a continuum of effects associated with exposures to varying levels of PM." 62 Fed. Reg. at 38,673. In response to comments that the selection of any level along that continuum would be arbitrary unless balanced against countervailing considerations, the Administrator again asserted her prerogative to promulgate revised NAAQS using *ad hoc* analysis that recognizes "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." *Id.* at 38,688.

The Administrator's most basic choice was her decision to regulate PM based on particle size rather than chemical composition. She explained that "the available evidence is not sufficient to *exclude* nitrates or any other class of fine particles." 62 Fed. Reg. at 38,667 & n.26 (emphasis added). In contrast, she set different standards for small ("fine") and large ("coarse") particles, despite agreeing that the evidence on this point was also not entirely satisfactory, as relatively few studies have addressed fine PM, as opposed to PM generally. *See id.* at 38,665; *see also Huebner & Chilton* at 11-12 (only 7 of the 27 studies identified in Staff Paper actually address $PM_{2.5}$); Draft Memorandum from Rosina Bierbaum, OSTP, to Sally Katzen, OIRA (President's Office of Science and Technology Policy determines that "[t]he database for actual levels of $PM_{2.5}$ is . . . very poor;" "only a handful of studies have actually studied $PM_{2.5}$ per se," and "current data do not support clear associations of PM effects with . . . fine particles") (as quoted in Dana C. Joel, *Surprising Critics of the New Clean Air Standards: The U.S. Government*, Citizens for a Sound Economy Foundation Issue Analysis (Apr. 9, 1997) ("*Surprising Critics of the New Clean Air Standards*"). The

selection of $PM_{2.5}$ as the fine PM indicator was thus made "largely [as] a policy judgment." 62 Fed. Reg. at 38,665.

The Administrator's selection of a coarse particle indicator was also a subject of considerable discussion. Here, the Administrator retained the current PM_{10} measure, rather than accepting the "views of several CASAC panel members" who "suggested" replacing it with a $PM_{10-2.5}$ indicator—an indicator that measures only coarse particles and excludes fine ones. 62 Fed. Reg. at 38,668. She defended that selection by asserting that "the only studies of clear quantitative relevance to effects most likely associated with *coarse* fraction particles have used *undifferentiated* PM_{10}," and making the pragmatic observation that a "large" "monitoring network" is "already in place for PM_{10}." *Id.* (emphasis added).

Having chosen to regulate both fine and coarse PM and set the indicators for both, the Administrator proceeded to set actual standards. She determined that she would not adjust the levels of the current annual and 24-hour PM_{10} standards "[g]iven the uncertainties in the available scientific evidence." 62 Fed. Reg. at 38,678. As for fine PM, she decided to promulgate an annual standard to control emissions generally, and a supplementary 24-hour standard to protect against high peak concentrations and seasonal emissions, explaining that this would be the most "efficient approach." *See id.* at 38,570.

Whereas "uncertainties" in the "scientific evidence," 62 Fed. Reg. at 38,678, had prompted her to leave in place the current PM_{10} standards, the Administrator decided with respect to an annual fine PM standard that she would regulate, "*despite* well recognized uncertainties," down to levels "somewhat *below* where the body of epidemiological evidence is *most* consistent and coherent." *Id.* at 38,675 (emphasis added). In her view, "the strength of the evidence of effects increases for concentrations that are at or above the long term (*e.g.*, annual) mean levels reported for [certain] studies." *Id.* at 38,676. Studies reported in the Criteria Document had found mean

concentrations to "range from about 11 $\mu g/m^3$ to 30 $\mu g/m^3$." *Id.* After reciting these results, the Administrator concluded that "[t]aken together, and placing greatest weight on those studies that were clearly statistically significant, this evidence suggests that an annual standard level of 15 $\mu g/m^3$ is appropriate." *Id.* The Administrator did not dispute that this level is "*below* the range of annual data *most strongly* associated with both short- and long-term exposure effects." *Id.* (emphasis added). Nor did she rely on peak background levels or transiency and irreversibility of health effects, as she had in choosing an ozone NAAQS. *See id.*

The Administrator then concluded that, having enacted such a strict annual fine PM standard, there was "no need to consider levels in the lower portion" of the range suggested for the 24-hour fine PM standard. 62 Fed. Reg. at 38,677. "Further," she said that "the risk associated with peak 24-hour exposures in otherwise clean areas is not well enough understood at this time to provide a basis for selecting the more restrictive levels in the range of 50 to 65 $\mu g/m^3$." *Id.* Based on these rationales, she chose a 65 $\mu g/m^3$ level. *See id.* She did not discuss either the levels at which the evidence is "most strongly associated" with exposure effects, nor the mean concentrations from studies, as she had in choosing an annual $PM_{2.5}$ NAAQS. *See id.*

As with the ozone NAAQS, the Administrator also did not consider predicted compliance costs or any other non-medical information bearing on the consequences of her action. *See* 62 Fed. Reg. at 38,683; PMJA 312, 319 (EPA's Response to Comments). EPA acknowledged, however, that full attainment with its revised PM NAAQS by 2010 would cost at least $37 billion annually, making this standard the most expensive environmental program ever. Even "partial attainment," as defined by EPA, would cost $8.6 billion. *See* RIA at ES-12, 13. In contrast, the Agency estimated the benefits of full attainment to range from $20 to $110 billion, and those of

partial attainment to range from $19 to $104 billion. *See id.* at 12-1.

As with ozone, the difference between the high and low-end benefits estimates consists primarily in how mortality benefits are estimated and valued. *See, e.g.*, RIA at 12-44. The RIA calculated the high end estimates by valuing every avoided premature mortality at $4.8 million. *See id.* at 12-15, 16, 41. The RIA made an alternative estimate, however, in response to criticisms that estimating benefits from PM reductions should be based on "not only how many premature deaths are avoided, but . . . how long these deaths are postponed." *Id.* at 12-16. That alternative, reflected in EPA's low-end estimates, assigned a set value to every "statistical life-year extended." On that assumption, the fine PM standards' predicted benefits are significantly less than their predicted costs. *See id.*

The PM cost calculations are also similar to the ozone calculations in that they impose a $10,000 cost cap for "partial attainment," then assume that full attainment can be reached with measures that do not exceed this cap. *See* RIA at 6-16, 9-7. The President's Council of Economic Advisors determined that EPA's analysis "understates the true costs . . . by orders of magnitude." CEA Memorandum (as quoted in *Surprising Critics of the New Clean Air Standards* at 1).

C. The Congressional Response

Congress responded to EPA's final rules by postponing implementation of the revised ozone and PM standards, thus providing time for pre-implementation judicial review. *See* Pub. L. No. 105-178, §§ 6101-03, 112 Stat. 465 (1998). Specifically, Congress codified an Executive Order, issued the same day as the final ozone and PM rules, that delayed the implementation of the PM NAAQS until at least 2005. *See id.* § 6102; 62 Fed. Reg. 38,421, 38,427-28 (July 18, 1997). Congress also pushed back implementation of the ozone NAAQS by one year. *See* Pub. L. No. 105-178, § 6103(a).

And Congress emphasized that "[n]othing" in its action "shall be construed . . . to be a ratification of the ozone or [PM] standards." *Id.* § 6104.

D. The Court of Appeals Proceedings

1. Panel Proceedings

Before the D.C. Circuit, EPA continued to assert that it is barred from considering non-health factors including compliance costs in setting NAAQS, and that it is even barred from considering the protective health effects of ground-level ozone. *See, e.g.*, EPA Ozone Br. at 43. Based on *Lead Industries*, the D.C. Circuit agreed with the Agency's refusal to consider compliance costs. "Our cases read § 109(b)(1) as barring EPA from considering any factor other than 'health effects relating to pollutants in the air.'" Pet. App. 15a (citing, *inter alia*, *Lead Industries*, 647 F.2d at 1148). The D.C. Circuit emphasized that its "*Lead Industries* decision was made in *Chevron* step one terms," and held that *Lead Industries* unambiguously "precludes" EPA from considering costs. *See id.* at 19a.

The D.C. Circuit disagreed, however, with EPA's claim that "nothing in the statute requires [the Administrator] to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." EPA Ozone Br. at 43 (emphasis added). Instead, the court held that section 109 must be construed to provide some "intelligible principle" that guides the exercise of agency discretion. *See* Pet. App. 5a. The court found that EPA's construction of the Act fails this test by not "speak[ing] to the issue of degree." *Id.* at 7a. It then illustrated the point by using the Agency's justification for choosing a 0.08 ppm level for ozone. *See id.* at 8a-11a. The court explained that, while EPA claims to have chosen 0.08 ppm over 0.09 ppm "because more people are exposed to more serious effects at 0.09 than at 0.08," it "never contradict[ed] the intuitive proposition, confirmed by data in its Staff Paper, that reducing the [0.08]

standard to [0.07] would bring about comparable changes." *Id.* at 8a. EPA responded that "a 0.07 standard would be 'closer to peak background levels,'" but "a 0.08 level, of course, is also *closer* to these peak levels than 0.09." *Id.* at 9a (emphasis in original).

The court discounted the Administrator's reliance on individual CASAC members on the ground that they merely stated their "personal" preferences—preferences that provided no reasoned basis for preferring a 0.08 ppm or 0.09 ppm level to a 0.07 ppm level. *See* Pet. App. 8a. As the court put it:

> EPA's explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm. Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety . . . ."

Id. at 7a.

The court found the same flaws in EPA's attempts to justify its PM NAAQS. EPA defended those standards "on the basis that there is greater uncertainty that health effects exist at lower levels than the level of the standard." Pet. App. 10a. But the court responded that "the increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much. None does." *Id.* The court accordingly "remand[ed] the cases for EPA to develop a construction of the act that satisfies" the nondelegation doctrine and, "if appropriate, modify the disputed NAAQS in accordance with that construction." *Id.* at 4a-5a.

The D.C. Circuit emphasized that, although some form of cost-benefit or similar analysis could ordinarily serve as the

necessary "intelligible principle," such an approach "is not available" because of *Lead Industries*. Pet. App. 15a (internal quotation omitted). The court suggested one alternative construction for the Agency to consider, a principled "criterion of probability" analysis based on a "generic unit of harm that takes into account population affected, severity and probability." *Id.* at 16a. The court acknowledged, however, that since "EPA may not consider cost," it may have to "conclud[e] that there is no principle available" that would be constitutionally sufficient. *Id.* at 18a. Judge Tatel dissented from the court's nondelegation analysis. *See id.* at 59a.

In contrast, the court unanimously reversed EPA's refusal to consider the potential health protective effects of ground-level ozone, labeling "bizarre" the Agency's contention "that a statute intended to improve human health would . . . lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance." Pet. App. 47a. As for particulate matter, the court also unanimously reversed the Agency's use of PM_{10} as an indicator for coarse PM. The court explained that, having determined that coarse and fine particles should be regulated separately, EPA acted arbitrarily and capriciously by using an indicator for coarse particles that includes fine particles. *See id.* at 49a-53a. The court further noted that EPA's reliance on a "pragmatic" basis for this decision—specifically, the fact that a monitoring program for PM_{10} already exists—is contrary to EPA's own position that it may not consider pragmatic factors in setting NAAQS. *See id.* at 52a-53a.

Finally, the court of appeals addressed Subpart 2 of the Act, which establishes a specific schedule for reducing ozone levels nationwide. *See supra*, at 4, 5. The court accepted EPA's contention that, notwithstanding the detailed provisions of Subpart 2, the Agency may still revise the ozone NAAQS. *See* Pet. App. 31a-43a. In doing so, however, the court unanimously rejected EPA's contention that "Subpart 2

specifically provides classifications and attainment dates only for nonattainment designations under the [existing] ozone NAAQS." *Id.* at 37a. The text and drafting history of this provision confirm that it applies to all ozone NAAQS, including revised NAAQS. *See id.* at 38a-39a. Because Congress' handiwork was "purposeful and not the drafting error that EPA's interpretation implies," "EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." *Id.* at 34a, 39a.

2. Rehearing Proceedings

In response to EPA's rehearing petition, the panel underscored that, because EPA's statutory interpretation lacked an "intelligible principle," remand to the agency was the appropriate remedy: "[J]ust as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority." Pet. App. 76a (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984)). The panel also dismissed EPA's continuing contention that it should not be required to consider its standards' detrimental health effects, noting that the Agency's further arguments do not "warrant consideration in a published opinion." *Id.* at 82a.

The panel also unanimously rejected EPA's new argument that it lacked jurisdiction to reach the Subpart 2 issue because the Agency "has taken no final action implementing the revised NAAQS." Pet. App. 77a, 79a. The court explained that EPA's promulgation of the revised NAAQS "triggered" certain statutory provisions that "impose a number of requirements upon the states." *Id.* at 78a.

The panel also rejected EPA's reiterated contention that Subpart 2 amounts to a scrivener's error. *See* Pet. App. 79a. The panel noted that "all five Subparts of the Clean Air Act

providing requirements for nonattainment areas" contain the same language. *Id.* The panel then clarified that its holding merely meant that a revised ozone NAAQS "can be enforced only in conformity with Subpart 2," not necessarily that such a NAAQS "cannot be enforced" at all. *Id.* at 81a. Judge Tatel concurred, noting that this would "leav[e] open the possibility" that Subpart 2 applies only until an area attains the existing ozone NAAQS, such that "in areas that have attained the ozone standard, nothing precludes enforcement of the new standard" outside of the Subpart 2 framework. *Id.* at 88a, 89a. The *en banc* court unanimously denied rehearing on this issue.

Two opinions dissenting from the denial of rehearing *en banc* addressed the main statutory interpretation questions. *See* Pet. App. 92a. Judge Silberman's dissent disagreed with the panel majority's use of the nondelegation doctrine, but emphasized that he was "quite uncertain" whether EPA's analysis satisfied the demands of the "arbitrary and capricious standard." *Id.* at 95a-96a. Judge Tatel, joined by Chief Judge Edwards and Judge Garland, also dissented from denial of rehearing because he disagreed with the panel's use of the non-delegation canon. *See id.* at 97a.

E. The Grant of the Petition and Cross-Petition

The Government petitioned for *certiorari* on the nondelegation and Subpart 2 issues, and ATA cross-petitioned to challenge the court of appeals' holding that EPA must "ignore all factors 'other than health effects relating to pollutants in the air'" in setting NAAQS. Cross-Pet. (i). ATA argued that the cross-petition should be granted because reversing the D.C. Circuit on this point would permit the Court to "avoid[] the constitutional nondelegation issue on which EPA focuses." *Id.* at 1. This Court granted both petitions, and set a briefing schedule. *See* 120 S. Ct. 2193 (2000); 120 S. Ct. 2003 (2000).

SUMMARY OF THE ARGUMENT

The court of appeals recognized the trilemma logically entailed by the *Lead Industries* interpretation: *either* (1) the Act must direct EPA to set a zero-level NAAQS for non-threshold pollutants like ozone and PM; *or* (2) EPA must be empowered to select arbitrarily some level above zero for these pollutants (the selection necessarily being arbitrary because any forthright consideration of medical factors alone would likely produce zero standards); *or else* (3) *Lead Industries* must have been wrongly decided.

What the D.C. Circuit did not say expressly was that it is entirely unreasonable to assume Congress would have delegated the authority presupposed by options (1) and (2). If Congress ever intended the "zero risk" standards of option (1)—which, the court of appeals noted, would require "de-industrialization" or worse, Pet. App. 15a n.4—then surely Congress, and not EPA, would be required to make that policy choice explicitly. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646, 675 (1980) (opinions of the plurality and Rehnquist J., concurring) ("*Benzene*"). Likewise, the second option, arbitrary selection of some level above zero, runs afoul of this Court's decisions requiring agencies "to apply *some* limiting standard" in the exercise of delegated authority. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386-90 (1999) (emphasis in original). Finally, options (1) and (2) alike presuppose that Congress might delegate to EPA, the courts, or both, extraordinary authority and discretion over decisions of great "economic and political significance"—a further presumption that cannot be squared with this Court's precedents. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance . . . in so cryptic a fashion."). *See* Part I, *infra*.

Logically, then, the third option—that *Lead Industries* was wrongly decided—must be the case and, in fact, *is* the case under any straightforward interpretation of the Act. *First*, primary NAAQS are set at levels "requisite to protect the public health" "with an adequate margin of safety." Because "public health" is left undefined, that term must be given its "ordinary" and "natural" meaning. By 1970, when section 109(b) was enacted, public health had already taken the meaning given it by public health professionals whose job is to improve health through a synthesis of the medical and social sciences, including economics. Tellingly, the critical role that costs play within this public health tradition is directly at odds with *Lead Industries'* absolute bar on considering such factors in setting NAAQS. *See* Part II.A, *infra*.

Second, provisions surrounding section 109(b) give further testimony to the important role countervailing factors should play in NAAQS rulemakings. Specifically, the information on which NAAQS are to be "based" is not limited to the section 108(a)(2) Criteria Document (which itself should properly include non-medical information), but also includes CASAC's findings, recommendations, and comments, as well as comments and data from the public. Section 108(b) accordingly requires EPA to develop data on control costs *simultaneously* with preparation of the Criteria Document and well in time to be used in the relevant NAAQS rulemaking. Likewise, section 109(d) requires, *inter alia*, that CASAC "advise the Administrator of any adverse public health, welfare, *social, economic or energy effects* which may result from" EPA's proposed NAAQS. *See* Part II.B, *infra*. *Finally*, as the record here demonstrates, EPA simply cannot achieve the Act's statutorily-codified purpose of "public health" protection—or even avoid doing more harm than good—without taking countervailing factors into account. *See* Part II.C, *infra*.

One last option requires exploration. Perhaps, notwithstanding *Lead Industries*, EPA often does consider

countervailing factors such as compliance costs in setting NAAQS—albeit covertly and beyond public view. In fact, the scholarly literature establishes that economic analyses played significant, behind-the-scenes roles in setting both the 1979 ozone NAAQS and the 1987 PM NAAQS. The Administrator's repeated invocations of her wide, discretionary powers of "judgment" therefore might be meant as hints that such analyses played similar roles here. Such disguised decisionmaking would underscore the conflict between EPA's professed interpretation of section 109 and its practice under analogous Clean Air Act provisions, where, notwithstanding *Lead Industries*, the Agency has openly and successfully claimed authority to consider economic factors. *See* Part III.A, *infra*. Even more important, however, such concealed decisionmaking would (1) undermine Presidential oversight under the cost-and-benefit-assessment provisions of Executive Order 12,866; (2) defeat similar requirements of the Unfunded Mandates Reform Act of 1995; and (3) subvert the foundational premises of judicial review on traditional rationality grounds. *See* Part III.B, *infra*. For all of the above reasons, *Lead Industries* should be rejected by the Court.

ARGUMENT

As noted in our *certiorari* briefing, the D.C. Circuit has treated *Lead Industries* as a precedential leper—diseased but untouchable—ever since it re-endorsed it in fashioning a consensus interpretation of another Clean Air Act provision in *NRDC v. EPA*, 824 F.2d 1146, 1154-58 (D.C. Cir. 1987) (*en banc*) ("*Vinyl Chloride*"). *Lead Industries* itself directly addressed and rejected only arguments that an "economic and technological feasibility" test must be used in establishing "margins of safety" under section 109, and that the Agency must show "clear" health effects before regulating. *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148, 1153-54 (D.C. Cir. 1980). But the D.C. Circuit has since read *Lead Industries* to preclude consideration of *all* factors of "cost," *American Petroleum Inst.*

v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981), and even indirect *health* effects such as "health risks from unemployment" caused by a more stringent NAAQS. *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *vacated in part*, 921 F.2d 326 (D.C. Cir.), *cert. dismissed sub nom. Alabama Power Co. v. NRDC*, 498 U.S. 1075 (1991). This line of cases has become so extreme that the panel below brushed aside without comment arguments that the Agency erred by ignoring *health* effects resulting from disruption of the States' ongoing air-quality improvement efforts. *See* OJA 223; PMJA 319. "*Lead Industries*," as used below and elsewhere, has thus become a shorthand for the D.C. Circuit's extreme insistence that all countervailing factors (excepting only a pollutant's direct health benefits) are "non-health" factors and therefore barred from EPA's consideration in setting NAAQS.

I. THIS COURT'S DECISIONS NEGATE THE PREMISES ON WHICH *LEAD INDUSTRIES* IS PREDICATED.

No statute, and certainly not the Clean Air Act provisions at issue here, can be interpreted in a contextual vacuum. To be sure, "[t]he task of resolving the dispute over the meaning of" statutes must begin "with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). But "as [this Court] ha[s] repeatedly stated, the meaning of statutory language, plain or not, depends on context." *Holloway v. United States*, 526 U.S. 1, 7 (1999) (internal quotation and citations omitted); *see also, e.g., Schenck v. Pro-Choice Network*, 519 U.S. 357, 395 (1997) (opinion of Breyer, J.) ("Words take on meaning from context."). The requirements for NAAQS standard-setting, therefore, must be decided within "the broader context of [the statute]," including the nature of the problem Congress sought to solve. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997).

The court of appeals set out the context here in detail. To begin with, "EPA regards ozone definitely, and PM likely, as

nonthreshold pollutants, *i.e.*, ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." Pet. App. 5a. Accordingly, "the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero." *Id.* at 6a. EPA thus recognizes "that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm." *Id.* at 7a. But that truism does not mean "that keeping pollution at or below any particular level is 'requisite' or not requisite to 'protect the public health' with an 'adequate margin of safety.'" *Id.*

Logically, this context forces EPA to pursue just one of three regulatory options. *First*, "EPA could make its criterion the eradication of any hint of direct health risk"—an approach that "would require the agency to set the permissible levels of both pollutants here at zero." Pet. App. 15a. "A zero-risk policy might seem to imply de-industrialization, but in fact even that seems inadequate to the task (and even if the calculus is confined to direct risks from pollutants, as opposed to risks from the concomitant poverty)." *Id.* at 15a n.4. As EPA's Staff Paper and a World Bank report show, "PM (at least) results from almost all combustion, so only total prohibition of fire or universal application of some heretofore unknown control technology would reduce manmade emissions to zero." *Id.*

Second, EPA could select a non-zero standard without considering the factors that might counsel in favor of or against a more or less stringent NAAQS. But the difficulty with this option is that any such selection must, of necessity, be made arbitrarily. In these very rulemakings, "the agency rightly recognizes that the question is one of degree," but nonetheless "offers no intelligible principle by which to identify a stopping point." Pet. App. 11a. Indeed, EPA all but admits to having made arbitrary choices by repeatedly asserting that it was free to follow an *ad hoc* standard-setting approach that recognizes

"no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." 62 Fed. Reg. at 38,864, 38,683, 38,688.

Finally, "cost-benefit analysis, mentioned in [*International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991) ("*Lockout/Tagout I*")]," would provide a third alternative for NAAQS standard-setting but for the fact that it is precluded by *Lead Industries*. Pet. App. 14a-15a. The court of appeals' citation makes clear that, as used below, "cost-benefit analysis" means "only a systematic weighing of the pros and cons." *Lockout/Tagout I*, 938 F.2d at 1321; *accord* Stephen G. Breyer, *et al.*, *Administrative Law & Regulatory Policy* 181 (4th ed. 1999) ("cost-benefit criteria would be understood in a less technical and more commonsensical way, as an invitation to balancing a range of variables"). This concept is broad enough to include properly performed analyses under "significant risk" and similar rubrics. *Cf. Benzene*, 448 U.S. at 641-42 (plurality opinion). Indeed, the court below suggested that EPA might develop an intelligible principle based on one such approach —"a generic unit of harm," reflecting "Quality-Adjusted Life Years." *Id.* at 16a-18a. But the court recognized that even that approach might well be precluded by *Lead Industries*. *See id.* at 18a.

Only the third of these options—a systematic weighing of pros and cons based upon rejection of *Lead Industries* —can be squared with this Court's precedents. As an initial matter, the option of a zero-risk policy is expressly disclaimed by even EPA, *see* Pet. App. 15a; *supra* at 7, and, in any event, could not be adopted without the clearest possible evidence of congressional intent. As this Court has noted, it is generally "unreasonable to assume that Congress intended to give [an agency] the unprecedented power over American industry" to "impose enormous costs that might produce little, if any,

benefit." *Benzene*, 448 U.S. at 645 (plurality opinion); *see also id.* at 675-76 (opinion of Rehnquist, J.). Needless to say, there is no such evidence of intent here.

The second option, non-zero standards set by decisionmakers blinded to all countervailing factors, is similarly precluded by this Court's decisions. As *Iowa Utilities* holds, all congressional delegations "require" the agency "to apply *some* limiting standard, *rationally* related to the goals of the Act." *Iowa Utilities*, 525 U.S. at 388 (first emphasis in original). The need for such limiting principles is especially compelling where, as here, the entire economy is to be regulated. *See Fahey v. Mallone*, 332 U.S. 245, 250 (1947) (holding that delegations confering power over "unprecedented economic problems of varied industries" must be more precise than those regarding "a single type of enterprise"); *Clinton v. New York*, 524 U.S. 417, 487 (1998) (Breyer J, concurring). Because selection of *any* non-zero NAAQS cannot be made "rationally" without a weighing of pros and cons, *see Iowa Utilities*, 525 U.S. at 388, any non-zero NAAQS established under *Lead Industries* will necessarily be arbitrary.

Both zero-risk and arbitrarily-set standards also suffer from a further flaw under this Court's decisions. *Lead Industries* must mean either (as the D.C. Circuit says) that Congress itself barred EPA from considering countervailing factors—an implausible proposition for the reasons summarized below, *see* Part II—or else that Congress delegated to EPA the discretion to ignore all "non-health" factors in setting NAAQS. This Court traditionally "hesitates," however, "before concluding that Congress has intended such an implicit delegation." *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1296, 1314 (2000). Indeed, "[i]t is highly unlikely that Congress would leave" choices of such magnitude to an administrative agency. *MCI v. AT&T*, 512 U.S. 218, 231 (1994). Thus, "[t]he implausibility of Congress's leaving a highly significant issue unaddressed . . . is assuredly one of the factors to be considered

in determining whether there is ambiguity." *Christensen v. Harris County*, 120 S. Ct. 1655, 1664 n.1 (2000) (Scalia J., concurring); *accord id.* at 1667 (Breyer, J., dissenting) (*Chevron* deference inapplicable "where one has doubt that Congress actually intended to delegate interpretative authority to the agency.")

This Court's decisions alone are therefore enough to prove that *Lead Industries* was wrongly decided—unless, perhaps, the statutory text were so absolutely clear as to lead inescapably to the conclusion that Congress deliberately precluded EPA from considering all supposedly "non-health" factors in setting NAAQS. But just the opposite is the case. Far from compelling the *Lead Industries* reading, the statutory text of section 109(b)(1), the surrounding statutory provisions and the Act's public health purpose all show that Congress contemplated that EPA *would* weigh such factors in the standard-setting balance.

II. THE ACT'S TEXT, STRUCTURE AND PURPOSE SHOW THAT EPA MUST CONSIDER NON-HEALTH FACTORS IN SETTING NAAQS.

The D.C. Circuit has most authoritatively stated its rationale for *Lead Industries* as follows: "ambient air standards set under section 109(b) must be based on 'air quality criteria,' which section 108 defines as comprising several elements, all related to health," thereby excluding "non-health" factors. *Vinyl Chloride*, 824 F.2d at 1157-59. That rationale is demonstrably wrong. *First*, the key text of section 109(b) was added in 1970 to direct that EPA protect "public health," a term of art that traditionally signals the consideration of both medical and economic factors. *See* Part II.A, *infra*. *Second*, surrounding statutory provisions in sections 108(a), 108(b) and 109(d) all confirm that what the D.C. Circuit implies are "non-health" factors, including compliance costs, are to be considered in setting NAAQS. *See* Part II.B, *infra*. *Finally*, the Act's purposes, as stated in section 101(b), further reinforce the

role that these factors must play in standard-setting. *See* Part II.C, *infra*.

A. Section 109(b)(1)'s "Public Health" Focus Necessarily Entails Consideration of Non-Health Factors.

The Act's core standard-setting provision, section 109(b)(1), reads as follows:

> National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.

42 U.S.C. § 7409(b)(1). The aim of this provision is manifestly to protect "public health," but precisely what is meant by those two words (or other key terms like "adequate" or "requisite" or "margin of safety") is nowhere defined. We do know that section 109(b) was added by Congress in 1970 to replace a previous State/federal enforcement mechanism that provided that pollution that "endangers the health or welfare *of any persons* shall be subject to abatement." *See* Pub. L. No. 90-148 § 108(a) (emphasis added). It is therefore logical to presume that Congress intended to shift the focus away from pollution that endangers "any person" and toward a broader concept of "public health."

With no definition in the statute itself, "public health" must be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). "Public health" was, of course, a well-established profession in 1970. The discipline then, as now, is practiced through a synthesis of medical and social sciences, with a significant emphasis on economics. As the shift away from the language referring to the "health" of "any person" and toward the aggregate expression "public health" implies, the 1970 Congress must

have expected EPA to set standards by acting like public health professionals, engaged in the traditional practice of their combined medical and social science discipline.

The authoritative public health definition available to the 1970 Congress appeared in C.E.A. Winslow's THE COST OF SICKNESS AND THE PRICE OF HEALTH, published in 1951 as a study for the World Health Organization on the comparative costs and effectiveness of various measures for controlling tuberculosis. That study defines "public health" as follows:

> Public health is the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency [by various means including] the development of social machinery which *will ensure* to every individual in the community *a standard of living* adequate to the maintenance of health.

Id. at 28 (emphasis added). As is evident from the title and contents of Winslow's seminal work, costs provide an important counter-balance in the practice of "public health," as Winslow understood the term. In particular, costs are integral in choosing the "social machinery" for providing specific forms and levels of health protection and in determining the effect which specific measures will have on the population's "standard of living." *See id.* Indeed, Winslow himself exemplifies the use of cost data for these purposes by discussing the relative economic merits of preventative versus curative strategies. *See id.* at 28-29.

It is therefore significant that Winslow's public health definition is cited to this day in leading technical dictionaries. *See* Andrew Porteous, DICTIONARY OF ENVIRONMENTAL SCIENCE AND TECHNOLOGY 445 (2d ed. 1996) ("The basic definition of public health has been given by C.E.A. Winslow, THE COST OF SICKNESS AND THE PRICE OF HEALTH; *accord* Committee for the Study of the Future of Public Health, Division of Health Care Services, Institute of Medicine, THE

FUTURE OF PUBLIC HEALTH 39 (1988) (calling Winslow's definition "[o]ne of the earliest deliberate efforts to define public health's mission [and] still one of the most frequently cited"). Moreover, Winslow's concept of public health as considering costs through the synthesis of the medical and social sciences remains influential not just in works of reference, but also in the scholarly literature.[1]

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[1] *See* David R. Holtgrave *et al.*, *Human Immunodeficiency Virus Counseling, Testing, Referral, and Partner Notification Services, A Cost-Benefit Analysis*, 153 Arch. Intern. Med. (1993); Peter D. Jacobson, *et al.*, *Litigation and Public-Health Policy Making: The Case of Tobacco Control*, 24 J. Health Pol. Pol'y & L. 769, 800 (1999) ("In any given public health issue, the balance will vary depending on the nature and extent of the abridgment of individual liberties, the nature and costs of the public health intervention, the alternatives to governmental intervention, the voluntariness of the activity, and the extent of harm to third persons in the absence of governmental activity."); George C. Cunningham, *A Public Health Perspective on the Control of Predictive Screening for Breast Cancer*, 7 Health Matrix: J. of L.-Med. 31, 36 (1997) (breast cancer screenings must be cost-beneficial and cost-effective); Michael J. Malinkowski, *Globalization of Biotechnology and the Public Health Challenges Accompanying It*, 60 Alb. L. Rev. 119, 163 (1996) ("The myriad of biotechnology capabilities now reaching commerce cannot be made sufficiently available to maximize improvements to public health without cost-benefit analysis."); *Sustainable Redevelopment of Brownfields: Using Institutional Controls to Protect Public Health*, 29 E.L.R. 10243 (1999) ("Among the issues relevant to the effectiveness of institutional controls are how long the risk is expected to remain, how many people may be exposed, potential exposure pathways, whether children may be exposed, how the population may change during the life of the risk, the cost of implementing the control, and the health and safety consequences of exposure."); Lawrence O. Gostin, *et al.*, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 Colum. L. Rev. 59, 128 (1999) ("Public health law reform should promote public health goals by mandating cost-effective alternatives"); Wendy E. Parmett, *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 Hous. L. Rev. 1663, 1687 & n.147 (1999) ("classic model of public health law" considers a form of cost-benefit analysis); Lawrence O. Gostin & Zita Lazzarini, *Prevention of HIV/AIDS*

(continued...)

Although it is surely impossible to elicit a single formulation of what it means to "protect public health," there can be no doubt that the phrase has long connoted a sensitivity to comparative costs and benefits. Indeed, it may be possible to generalize from the academic literature that "[p]ublic health interventions should be based on the degree of risk, *the cost and efficacy of the response*, and the burden on human rights." Lawrence O. Gostin & James G. Hodge, Jr., *The Public Health Improvement Process in Alaska: Toward a Model Public Health Law*, 17 Alaska L. Rev. 77, 83 (2000) (emphasis added). But whatever precise formulation of the role of costs and similar considerations is chosen, the fact remains that the practice of modern "public health" means that these factors, at a minimum, must be considered. Indeed, this Court itself recently recognized in a different context that Congress could not have intended health concerns to exclude all consideration of cost, since the determination what degree of "risk" is "unacceptabl[e]" necessarily "depend[s] on a judgment about the appropriate level of expenditure for health care in light of the associated . . . risk." *Pegram v. Herdrich*, 120 S. Ct. 2143, 2150 (2000). There is accordingly no way to reconcile the "ordinary and natural" meaning of "public health," *see Meyer*, 510 U.S. at 476, with *Lead Industries*' absolute bar on the consideration of such factors.

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[1] (...continued)
Among Injection Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention, 46 Emory L.J. 587 (1997) ("the public health perspectiv[e] . . . readily lends itself to a consequentialist analysis," specifically, "weighing the benefits, costs, and harms generated by each approach, to determine which yields the greatest aggregate value").

B. The Supporting Provisions in Sections 108(a), 108(b) and 109(d) Confirm that Non-Health Factors, Including Compliance Costs, Are to Be Considered in Setting NAAQS.

The *Lead Industries* line of cases has never focused on the meaning of public health as outlined above. Those precedents seek instead to tease out a definition, not directly, but by negative implication from the fact that section 109(b)(1) directs that NAAQS be promulgated "based on such criteria," presumably meaning the criteria document described in section 108(a)(2). Section 108(a)(2) requires EPA to develop:

> Air quality criteria for an air pollutant [that] shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of *all identifiable effects on public health or welfare* which may be expected from the presence of such pollutant in the ambient air, in varying quantities.

CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2) (emphasis added). The provision then sets forth, in its subparagraphs (A), (B), and (C), three specific types of material that a criteria document "*shall* include" "to the extent practicable": (A) "variable factors" which may alter the effects of the pollutant on "public heath or welfare;" (B) other "air pollutants" that "may interact" with the pollutant under study in the atmosphere "to produce an adverse effect on public health or welfare;" and (C) "any known or anticipated adverse effects on welfare." *Id.*

As an initial matter, Subparagraph (C) by its terms apparently contemplates that the criteria documents should go beyond public health (however defined) and include information on "any known or anticipated adverse effects on public welfare." "Welfare" is then defined by the Act to mean effects on "soils, water, crops vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property . . . as well as effects on *economic*

values and on personal comfort and well-being." CAA § 302(h), 42 U.S.C. § 7602(h) (emphasis added). Under any straightforward reading of these texts, the criteria document must therefore *include* information on "adverse" effects on "economic values and personal comfort"—concepts that surely are broad enough to encompass non-health factors such as compliance costs. Of course, such data are essential for setting "secondary" NAAQS under section 109(b)(2). But nothing in either section 108 or section 109 limits the use of cost and similar data to the setting of "secondary" standards, or excludes such information from consideration in setting "primary" standards, such as those at issue here.

The D.C. Circuit has never addressed the text of section 108(a)(2)(C) except obliquely and in dictum. *See Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1117-18 (D.C. Cir. 1979) ("*MEMA*"). The D.C. Circuit's *MEMA* dictum suggests, however, that criteria documents need only assess those "welfare effects" attributable to airborne pollution itself, not welfare effects that attend NAAQS compliance. *See id.* at 1118 ("The terms 'public health and welfare' . . . encompass economic values, but only to reflect the economic costs of pollution, not the social costs of pollution control."). But that reading is contradicted by the immediately preceding text of section 108(a)(2), which says that "[a]ir quality criteria for an air pollutant shall accurately reflect . . . *all* identifiable effects on public health *or welfare* which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2) (emphasis added). This broad directive to assess "*all* identifiable effects" on "welfare" attributable to "the presence of such pollutant in the ambient air" is, of course, precisely the meaning which the *MEMA* court would give to the entirely separate statement in section 108(a)(2)(C). The *MEMA* dictum thus violates the "cardinal principle of statutory construction" that statutes must be read so as "to give effect, if possible, to

every clause and word of a statute." *Bennett v. Spear*, 520 U.S. 154, 173 (1997).

The D.C. Circuit also has assumed that section 108(a)(2) "outlines *the criteria*"—that is, the *exclusive* criteria—"on which air quality standards are to be based." *Vinyl Chloride*, 824 F.2d at 1159 (quoting *Lead Industries*, 647 F.2d at 1149 n.37) (emphasis added). But the text of section 109(b)(1) does not compel this reading and other provisions of sections 108 and 109 positively refute it. *First*, the D.C. Circuit's interpretation fails to read "criteria" in conjunction with the rest of the Act. Outside of the Clean Air Act, "criteria" can and often do refer to standards on which "a decision may be based." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 307 (9th ed. 1987). As used in section 108, however, "criteria" refers not to decisional standards, but to the compilations of information that the Act requires EPA to use in NAAQS standard-setting. EPA itself refers to each such compilation in capital letters as a "Criteria *Document*." *See, e.g.*, 62 Fed Reg. at 38,654 (PM rule); 62 Fed. Reg. at 38,857 (Ozone rule).

Second, a Criteria Document does not remotely establish the *exclusive* compendium of decisional information necessary for NAAQS standard-setting. The Act directs EPA to set standards "based on" criteria documents; it does *not* require that standards be "based *solely* on" criteria documents. Section 108 instead identifies information that criteria documents must "include," but are not necessarily limited to—the information listed in subparagraphs (A), (B), and (C) of section 108(a)(2). The Act then directs EPA to consider the Criteria Document *in conjunction with* other informational sources, including the "findings, recommendations and comments" of CASAC, CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3), plus "written comments, data, or documentary information" submitted by the public, CAA § 307(d)(4)(B)(i), 42 U.S.C. § 7607(d)(4)(B)(i). Moreover, Congress plainly expected that all of these data—even those outside the Criteria Document—would be

part of the Administrator's decisionmaking data set. The Act thus expressly provides that EPA must respond to significant public "comments, criticism, and new data," CAA § 307(d)(6)(B), 42 U.S.C. § 7607(d)(6)(B), and offer "an explanation of the reasons" for departures from CASAC's recommendations. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3).

Congress also made plain that compliance cost data, again including data not contained in a Criteria Document, are among the types of information that EPA necessarily must consider. The 1970 amendments added not just section 109(b), but also an elaborated requirement in section 108(b) that EPA issue—"simultaneously" with the Criteria Document and *before* EPA opens a NAAQS rulemaking—"information" on the "cost" of "air pollution control techniques." CAA § 108(b)(1), 42 U.S.C. § 7408(b)(1). Section 108(b)(1) mandates that this cost information be provided to "states and appropriate air pollution control agencies," "announced in the Federal Register," and "made available to the general public." CAA § 108(d), 42 U.S.C. § 7408(d). Given the Act's extensive procedural provisions, the requirement that cost information be provided *simultaneously* with a criteria document means that it must be made available at least three or four years before States begin planning compliance with a revised NAAQS. In the meantime, EPA must provide time for CASAC review, issue a proposal to revise a NAAQS, promulgate a final NAAQS, and make area designations of compliance or non-compliance with the new standard. *See* CAA § 107(d), 42 U.S.C. § 7407(d). The self-evident purpose of section 108(b)(1)'s otherwise inexplicably premature mandate must be to equip States, localities, and others with the information needed to criticize EPA's consideration of compliance costs in NAAQS standard-setting proceedings. *Cf.* CAA § 307(d)(6)(B), 42 U.S.C. § 7607(d)(6)(B) (EPA required to "respond to significant" public "comments, criticism, *and new data*") (emphasis added).

If there were any doubt on this point, it was laid to rest by the 1977 Amendments, which added the requirement that CASAC "advise the Administrator" on both health considerations *and* countervailing factors, including "*any* adverse public health, welfare, *social, economic, or energy effects* which may result from various strategies for attainment and maintenance of" the NAAQS. CAA § 109(d)(2)(C)(iv), 42 U.S.C. § 7409(d)(2)(C)(iv) (emphasis added). EPA cannot seriously maintain that this required advice was to play no role in the setting of revised NAAQS, for the Act also expressly specifies that whenever EPA notices proposed NAAQS revisions, it must summarize "*any* pertinent findings, recommendations, and comments" by CASAC (including advice under section 109(d)(2)(C)(iv)), and justify any significant departures from CASAC's recommendations. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3) (emphasis added); *accord* H.R. Rep. 95-294, 95th Cong., 1st Sess. 10 (1977) ("In deciding whether revision or promulgation of a new standard is necessary, the Administrator must consider the advice of an independent scientific review committee.").

The court below incorrectly rejected this interpretation, however, claiming that section 109(d)(2)(C)(iv) is aimed largely at state officials and NAAQS implementation efforts. *See* Pet. App. 21a. But that reading is contradicted by both the provision's text and the statutory structure. Section 109(d)(2)(C)(iv) could not be clearer—the advice called for by that provision is to be given to "the Administrator," not to State officials. Moreover, section 109, by its terms, exclusively concerns the setting of NAAQS by the EPA Administrator. It is other sections of the Act, including section 110 and all of Subpart 2 of Part D of Title I, that govern NAAQS implementation by the States. Accordingly, both the plain language and the placement of section 109(d)(2)(C)(iv) compel the conclusion that CASAC's economic advice is intended to be used in setting NAAQS.

C. The Statutory Purpose Confirms that EPA Must Consider Non-Health Factors in Setting NAAQS.

Considering all of the above provisions "in light of" the Act's "purposes and legislative history," *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 (1974), further reinforces the requirement that EPA engage in a commonsense weighing of benefits and costs. The first purpose of the Act, stated in section 101(b)(1), is "to protect and enhance the quality of the Nation's air resources *so as* to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1) (emphasis added). This statement of purpose underscores that NAAQS, the engine that drives the national pollution control program, must be geared to provide "public health" protection as traditionally defined. It also makes plain that the aim of the Act is *not* to protect the Nation's air resources for their own sake, but "*so as*" to "promote public health and welfare and *the productive capacity* of its population." *Id.* (emphasis added). This statement is a reminder that in the Clean Air Act, "public health and welfare" can never be divorced from "the productive capacity" upon which both necessarily depend.[2]

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[2] The legislative history reinforces this point. The 1970 committee reports do not directly address the question whether compliance costs should be considered in setting NAAQS, apparently because Congress simply assumed that benefits would dwarf those costs. A study in the Congressional Record thus estimates that air pollution imposed costs on the economy that "amount to many billions of dollars a year." Legislative History of the Clean Air Act Amendments of 1970, Vol. I at 248-49. The National Institute of Environmental Health further estimated "[t]he cost of environmentally induced disease" alone to be "*$38 billion* a year." *Id.* at 124 (emphasis added). By contrast, control costs were expected to total only *$2.6 billion* through 1975, plus an additional $1.9 billion in 1975, *id.* at 249—an estimate that in retrospect proved far too low. *See* Mark K. Landy, *et al.*, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON 67-70 (1994).

Given the Act's codified purpose and the traditional understanding of "public health," EPA is compelled to ask in each case whether its NAAQS will do more good than harm for public. The record here almost certainly produces a negative answer for ozone and, quite possibly, a negative answer for PM as well. EPA's ozone RIA, for example, shows that annual ozone compliance costs will exceed benefits by $1.1 billion to $8.1 billion for each year by 2010. RIA at ES-11, ES-17. By contrast, the high-end estimate of EPA's PM RIA purports to show net benefits. But, if CASAC's reservations about fine-particle mortality are credited, the predicted benefits fall to EPA's low-end estimate, which means that costs also exceed benefits for full attainment of the PM NAAQS. *See supra* at 19. Moreover, government officials outside EPA have uniformly faulted EPA's projected compliance costs for both ozone and PM as significantly understated. *See supra* at 11, 19. Finally, EPA's benefit estimates for both rules omit all offsets for health "disbenefits" of lower pollution levels, such as the diminished ground-level screening of ultra-violet radiation that OMB analysts project could be "similar in magnitude to the respiratory-related beneficial effects of [an ozone] reduction." OJA at 2759, 2764; *see also id.* at 3089; *supra* at 8-9.

III. EPA MAY ACTUALLY BE CONSIDERING NON-HEALTH FACTORS IN SETTING NAAQS WHILE USING *LEAD INDUSTRIES* AS A SHIELD AGAINST EXECUTIVE, CONGRESSIONAL AND JUDICIAL OVERSIGHT.

The history of past revisions to the ozone and PM standards shows that economic considerations almost inevitably play a role in setting NAAQS, and, equally significantly, that economic analyses can push decisionmakers in the direction of both more lenient standards (as in the 1979 ozone revisions) and more stringent ones (as in the 1987 PM revisions). In revising the ozone NAAQS in 1979, Administrator Costle admittedly took costs into account. In that case, the Regulatory

Analysis Review Group, established by a Carter Administration Executive Order, prepared detailed estimates of expected compliance costs assuming various NAAQS levels. *See* Mark K. Landy, *et al.*, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON 67-70 (1994). Despite EPA's interpretation that non-health factors were excluded from consideration, these estimates were carefully considered by Administrator Costle and were the centerpiece of heated debates between EPA and the Council of Economic Advisors over the appropriate level of a revised NAAQS. *Id.* at 70-73. Administrator Costle later admitted that the level he selected took into account both medical and economic considerations. *See* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1641-43 (1995).

The story was much the same when EPA last revised the PM NAAQS in 1987, albeit with a twist. There, the EPA Office of Policy Analysis prepared a cost-benefit assessment that tended to support selecting the new PM NAAQS from the lower end of the range proposed by the Staff Paper. *See* Thomas O. McGarity, REINVENTING RATIONALITY 47-48 (1991). Administrator Ruckelshaus, while expressing consternation that "he could not consider the cost and benefit information," stated nonetheless that the RIA (which was an outgrowth of this earlier economics staff analysis) "played no role whatsoever in his decisionmaking process . . . because he declined to read it." *Id.* at 50, 61. Still, "the knowledge among lower-level work group participants and midlevel managers [of the cost-benefit analysis] no doubt increased their comfort with recommending that the Administrator choose an option from the low end of the range." *Id.* at 61.

In light of this history, it certainly would not be surprising if EPA staff (or even the Administrator herself) privately consulted the available economic studies in setting these revised NAAQS. Indeed, the D.C. Circuit reversed the

Administrator for running afoul of *Lead Industries* by relying on a "pragmatic" consideration—specifically, "administrative convenience"—in selecting PM_{10} as the indicator for coarse PM. *See* Pet. App. 52a-53a; *supra* at 17. The Administrator also relied expressly on "efficien[cy]" concerns in deciding to promulgate both an annual and a 24-hour NAAQS for $PM_{2.5}$. *See* 62 Fed. Reg. at 38,670; *supra* at 17. And simultaneously with the issuance of the NAAQS, the Administrator issued a "soft" $10,000 compliance-cost cap per ton of emissions reductions based on the RIA. *See* 62 Fed. Reg. at 38,429.

As demonstrated below, this suggestive evidence raises still more fundamental questions about the viability of *Lead Industries*. The possibility that the Administrator may have considered supposedly non-health factors here, coupled with the fact that EPA routinely reads analogous Clean Air Act provisions to *permit* consideration of such factors, counsels the utmost skepticism when confronting EPA's continuing embrace of *Lead Industries*. *See* Part III.A, *infra*. And even more important, *Lead Industries* improperly shields EPA's decisionmaking from otherwise applicable executive, congressional and judicial oversight mechanisms. *See* Part III.B, *infra*. These two points present further grounds for rejecting *Lead Industries*.

A. EPA Cannot Distinguish NAAQS Standard-Setting from Analogous Clean Air Act Provisions Where the Agency Has Successfully Argued that Non-Health Factors May Be Considered.

Notwithstanding *Lead Industries*, EPA has successfully argued that similarly worded Clean Air Act provisions permit consideration of supposedly non-health factors, most recently in *State of Michigan v. EPA*, No. 98-1497, 2000 WL 180650 (D.C. Cir. Mar. 3, 2000). *State of Michigan* involved an interstate pollution transport provision prohibiting "any air pollutant in amounts which will . . . contribute *significantly*" to nonattainment of the national standards. CAA

§ 7410(a)(2)(D)(i)(I); 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). EPA argued this provision allows it to require upwind States to impose "highly cost-effective controls," namely controls capable of removing NOx at "a cost of $2,000 or less per ton." 2000 WL 180650, at *8.

The D.C. Circuit accepted EPA's interpretation based on an analysis that began by posing the following question: "[C]an an agency sensibly decide whether a risk is '*significant*' without also examining the *cost* of eliminating it?" *Id.* at *11 (internal quotation omitted). The court then ruled: "It is only where there is a 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *Id.* at *12. Turning to the provision at issue, the court acknowledged that, like other provisions of the Act, it was "[a] mandate directed to some environmental benefit . . . phrased in general quantitative terms ('ample margin of safety,' 'substantial restoration,' and 'major'), [that] contains not a word alluding to non-health tradeoffs." *Id.* After discussing its precedents interpreting these provisions, the court concluded that "in each case we found that in making its judgments of degree the agency was free to consider the costs of demanding higher levels of environmental benefit. So too here." *Id.*

Nor is *State of Michigan* the first D.C. Circuit case to uphold EPA's authority to consider compliance costs under Clean Air Act provisions that aim to improve air quality. *George E. Warren v. EPA*, for example, upholds consideration of costs under the Act's anti-dumping provision, CAA § 211(k)(8), 42 U.S.C. § 7545(k)(8), which requires that conventional gasoline from each supplier remain as clean as it was in 1990. 159 F.3d 616, 623 (D.C. Cir. 1998). Similarly, *NRDC v. EPA* upholds EPA's use of a cost-benefit analysis in determining whether to add various categories of industrial sources to the list of "major" sources under the Act's "prevention of significant deterioration" provisions. 937 F.2d

641, 643 (D.C. Cir. 1991). And, of course, the D.C. Circuit, sitting *en banc* in *Vinyl Chloride*, has also upheld consideration of costs in setting "ample margins of safety" for hazardous air-pollutant limitations. 824 F.2d at 1154-58.

In short, EPA's bald assertion of a NAAQS exception to otherwise well-established interpretive practice is unavailing. Certainly, this claimed exception finds no support in the statutory context or text. *See* Parts I and II, *supra*. Moreover, even if the Act did not require that countervailing factors be considered, EPA still could not maintain that it is permitted to ignore those factors, given *Brown & Williamson* and similar decisions of this Court. *See supra* at 31-32.

B. Rejecting *Lead Industries* Will Help to Insure Effective Executive, Congressional and Judicial Oversight for NAAQS Standard-Setting.

The well-established Executive Branch mechanisms for overseeing agency rulemaking will work in the NAAQS context only if *Lead Industries* is rejected. For over twenty-five years, the Office of the President has overseen most major regulatory initiatives by requiring steps designed to ensure that such programs are cost-beneficial and cost-effective. President Clinton's Executive Order 12,866, like similar Orders from previous Presidents, is directly enforced by the Executive, not the Judiciary. *See* 58 Fed. Reg. 51,735, § 10 (Sept. 30, 1993). The stated "philosophy" of that Order is that "agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." *Id.* § 1(a). "Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be measured) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." *Id.*

Significantly, however, the Order provides that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits

(including potential economic, environmental, public health and safety, and other advantages; distributional impacts; and equity), *unless a statute requires another regulatory approach.*" *Id.* (emphasis added). This highlighted proviso is then elaborated in section 1(b), which provides that the agencies must adhere to these principles only "*to the extent permitted by law.*" Given this proviso, NAAQS standard-setting will enjoy a blanket exemption from Presidential regulatory oversight so long as *Lead Industries* is the law.

Lead Industries poses essentially the same problems for congressional regulatory oversight. In 1995, Congress enacted the Unfunded Mandates Reform Act ("UMRA"), 2 U.S.C. § 1501 *et seq.*, to "requir[e] that Federal agencies . . . consider estimates of the budgetary impact of regulations . . . upon State, local and tribal governments and the private sector." *Id.* § 1501(7)(B). Congress further directed that, in promulgating each major proposed rule, the agency prepare a document that includes "a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate," *id.* § 1532(a)(2); *see also id.* § 1511(a), and then select the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule," *id.* § 1535(a). As with Executive Order 12,866, however, UMRA's provisions, which are directly enforced by Congress, rather than the courts, apply only unless otherwise prohibited by law. *See id.* §§ 1532(a), 1535(b)(2). This exception likewise means that congressional oversight of NAAQS standard-setting under UMRA will not apply unless *Lead Industries* is rejected.

Lead Industries also threatens, for precisely the same reasons, the very foundations of effective judicial review. The Clean Air Act, like the APA, requires the Agency to engage in reasoned, non-arbitrary decisionmaking. *See* CAA § 307(d)(9), 42 U.S.C. § 7607(d)(9). Under this form of traditional rationality review, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by

which it reaches that result must be logical and rational." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). A necessary foundation for that review is the "strict and demanding requirement" that "an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Otherwise, the courts could not begin to determine whether the agency had exercised its discretion in a reasoned manner, and "expertise, the strength of modern government, [would] become a monster which rules with no practical limits on its discretion." *Id.*

To the extent that EPA actually considers costs, while maintaining publicly that it does not, *Lead Industries* jeopardizes the fundamental presuppositions under which Congress delegates authority to EPA in the first instance. The "recognition of Congress' need to vest administrative agencies with [delegated authority] carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision . . . ." *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 (1986) (plurality opinion). This requirement that agencies explain the actual basis for their decision "helps maintain public accountability" by exposing those decisions to public and congressional scrutiny. *See, e.g., American Med. Ass'n v. Reno*, 57 F.3d 1129, 1134 (D.C. Cir. 1995).

Finally, the alternative possibility that EPA truly is *not* considering costs runs afoul of a different reasoned decisionmaking requirement—the requirement that agencies undertake "consideration of the relevant factors" and "consider [each] important aspect of the problem." *State Farm*, 463 U.S. at 42. Non-health factors are "relevant" for NAAQS standard-setting for all of the statutory reasons detailed above. But it is not just the Clean Air Act itself that establishes their relevance; all of the most important decisionmakers in the NAAQS context have also deemed such factors critical to making the kind of hard choices that EPA necessarily must make in setting

NAAQS. That is true for EPA, as in *State of Michigan*, for President Clinton, as in Executive Order 12,866, and for Congress, as in the UMRA legislation.

UMRA is particularly instructive because it represents a *congressional* determination that costs are relevant, and thus should be considered under this Court's earlier decision in *State Farm*. As Judge Garland recently explained for the D.C. Circuit, the courts "may consider [such statutes] in determining whether EPA complied with the overall requirement that an agency's decisionmaking be neither arbitrary nor capricious," even though they are not judicially-enforceable in their own right. *Allied Local & Regional Mfrs. Caucus v. EPA*, No. 98-1526, 2000 WL 737750, at *16 (D.C. Cir. June 16, 2000) (interpreting UMRA and an analogous statute); *accord Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984) (Scalia, J.) ("To say that an agency's compliance with [the statute] is not reviewable as such is not to say that the agency can ignore with impunity the effect of its rules").

In sum, the context, text, structure, and purpose of the Act, as well as related sources of law, all confirm that EPA must consider countervailing "non-health" factors in setting NAAQS. If there were any doubt on that score, however, nondelegation considerations would require that they be resolved in favor of considering costs and other countervailing factors. The reasons why the nondelegation doctrine independently requires that *Lead Industries* be repudiated will be explained in our next brief.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals to the extent that it precludes EPA from considering factors other than health effects relating to pollutants in the air, and order that court to vacate EPA's ozone and PM NAAQS and remand for EPA to reconsider its standards under a proper interpretation of the Act.

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APPENDIX

CAA § 101, 42 U.S.C. § 7401. Congressional findings and declaration of purpose

(a) Findings—

The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

CAA § 108, 42 U.S.C. § 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology

and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

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CAA § 109, 42 U.S.C. § 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient

air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

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(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

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(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

CAA § 307, 42 U.S.C. § 7607. Administrative proceedings and judicial review

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(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

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(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

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(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information . . . .

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

****

Unfunded Mandates Reform Act, 2 U.S.C. § 1501. Purposes

The purposes of this chapter are—

(1) to strengthen the partnership between the Federal Government and State, local, and tribal governments;

(2) to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities;

(3) to assist Congress in its consideration of proposed legislation establishing or revising Federal programs containing Federal mandates affecting State, local, and tribal governments, and the private sector by—

(A) providing for the development of information about the nature and size of mandates in proposed legislation; and

(B) establishing a mechanism to bring such information to the attention of the Senate and the House of Representatives before the Senate and the House of Representatives vote on proposed legislation;

(4) to promote informed and deliberate decisions by Congress on the appropriateness of Federal mandates in any particular instance;

(5) to require that Congress consider whether to provide funding to assist State, local, and tribal governments in complying with Federal mandates, to require analyses of the impact of private sector mandates, and through the dissemination of that information provide informed and deliberate decisions by Congress and Federal agencies and retain competitive balance between the public and private sectors;

(6) to establish a point-of-order vote on the consideration in the Senate and House of Representatives of legislation containing significant Federal intergovernmental

mandates without providing adequate funding to comply with such mandates;

(7) to assist Federal agencies in their consideration of proposed regulations affecting State, local, and tribal governments, by—

(A) requiring that Federal agencies develop a process to enable the elected and other officials of State, local, and tribal governments to provide input when Federal agencies are developing regulations; and

(B) requiring that Federal agencies prepare and consider estimates of the budgetary impact of regulations containing Federal mandates upon State, local, and tribal governments and the private sector before adopting such regulations, and ensuring that small governments are given special consideration in that process; and

(8) to begin consideration of the effect of previously imposed Federal mandates, including the impact on State, local, and tribal governments of Federal court interpretations of Federal statutes and regulations that impose Federal intergovernmental mandates.

Unfunded Mandates Reform Act, 2 U.S.C. § 1511. Cost of regulations

(a) Sense of the Congress

It is the sense of the Congress that Federal agencies should review and evaluate planned regulations to ensure that the cost estimates provided by the Congressional Budget Office will be carefully considered as regulations are promulgated.

****

2 U.S.C. § 1532. Statements to accompany significant regulatory actions

(a) In general

Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement containing—

(1) an identification of the provision of Federal law under which the rule is being promulgated;

(2) a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as the effect of the Federal mandate on health, safety, and the natural environment and such an assessment shall include—

(A) an analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance (or otherwise paid for by the Federal Government); and

(B) the extent to which there are available Federal resources to carry out the intergovernmental mandate;

(3) estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of—

(A) the future compliance costs of the Federal mandate; and

(B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector;

(4) estimates by the agency of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material; and

(5)(A) a description of the extent of the agency's prior consultation with elected representatives (under section 1534 of this title) of the affected State, local, and tribal governments;

(B) a summary of the comments and concerns that were presented by State, local, or tribal governments either orally or in writing to the agency; and

(C) a summary of the agency's evaluation of those comments and concerns.

(b) Promulgation

In promulgating a general notice of proposed rulemaking or a final rule for which a statement under subsection (a) of this section is required, the agency shall include in the promulgation a summary of the information contained in the statement.

(c) Preparation in conjunction with other statement

Any agency may prepare any statement required under subsection (a) of this section in conjunction with or as a part of any other statement or analysis, provided that the statement or analysis satisfies the provisions of subsection (a) of this section.

§ 1535. Least burdensome option or explanation required

(a) In general

Except as provided in subsection (b) of this section, before promulgating any rule for which a written statement is required under section 1532 of this title, the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, for—

(1) State, local, and tribal governments, in the case of a rule containing a Federal intergovernmental mandate; and

(2) the private sector, in the case of a rule containing a Federal private sector mandate.

(b) Exception

The provisions of subsection (a) of this section shall apply unless—

(1) the head of the affected agency publishes with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted; or

(2) the provisions are inconsistent with law.

(c) OMB certification

No later than 1 year after March 22, 1995, the Director of the Office of Management and Budget shall certify to Congress, with a written explanation, agency compliance with this section and include in that certification agencies and rulemakings that fail to adequately comply with this section.

Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive Order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Statement of Regulatory Philosophy and Principles.

(a) The Regulatory Philosophy. Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private

markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) The Principles of Regulation. To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In

addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

****

Section 10. Judicial Review.

Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

****

(10)

No. 99-1426

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,
Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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QUESTION PRESENTED

Whether Sections 101, 108, and 109 of the Clean Air Act require that the Environmental Protection Agency, in evaluating the adequacy of nationwide ambient air quality standards that address predicted "risks" to health, consider the overall societal consequences of managing such risks in determining whether and how to revise such standards?

PARTIES TO THE PROCEEDINGS

1. The parties joining in this brief were petitioners in *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases), and *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1441 (and consolidated cases), and are listed below.

Appalachian Power Co.
Baltimore Gas and Electric Company
Carolina Power & Light Company
Central and South West Services, Inc.
Central Power and Light Company
Public Service Company of Oklahoma
Southwestern Electric Power Company
West Texas Utilities Company
Central Illinois Public Service Company
CINergy Corp.
Columbus Southern Power Company
Conectiv (petitioned as Delmarva Power & Light Co. and intervened as Atlantic City Electric Co. in the cases below)
Consumers Energy Company
Dayton Power and Light Company, The
Detroit Edison Company, The
Duke Energy Co.
FirstEnergy (petitioned as Ohio Edison Co. and Centerior Energy Co., (with Centerior Energy Co. subsidiaries Cleveland Electric Illuminating Co. & Toledo Edison Co.) in the cases below)
Florida Power Corporation

Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Kansas City Power & Light Company
Kentucky Power Company
LGE Energy Corp. (petitioned as Kentucky Utilities Company and Louisville Gas & Electric Co. in the cases below)
Madison Gas and Electric Company
Minnesota Power Company
Monongahela Power Company,
dba Allegheny Power System, Inc.
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Otter Tail Power Company
PacifiCorp
PPL Electric Utilities Corporation
dba PPL Utilities (petitioned as Pennsylvania Power & Light Corp.)
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Edison Company, The
dba Allegheny Power System, Inc.
Potomac Electric Power Company
Public Service Company of New Mexico
Salt River Project
South Carolina Electric & Gas Company
Southern Company
Alabama Power Company
Georgia Power Company

Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company
Tampa Electric Company
Union Electric Company
Virginia Power
West Penn Power Company
dba Allegheny Power System, Inc.
Wisconsin Electric Power Company
Edison Electric Institute
National Rural Electric Cooperative Association
American Chemistry Council (petitioned as Chemical Manufacturers Association in cases below and for a writ of certiorari)
American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
Meridian Gold Company
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association (petitioned as National Petroleum Refiners Association in the case below)
National Stone Association
Nevada Mining Association
Newmont Gold Co.
Phoenix Cement Company

United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

2. The following parties were petitioners in the cases whose judgment is under review, but have not joined in filing this brief.

Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)
American Farm Bureau Federation
American Portland Cement Alliance
American Trucking Associations, Inc.
James Bassage
Burns Motor Freight, Inc.
Central Illinois Light Co.
Chamber of Commerce of the United States of America
Citizens for Balanced Transportation
Commonwealth Edison
Duquesne Light Co.
Equipment Manufacturers Institute
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Judy's Bakery, Inc.
David Matusow
Brian McCarthy
National Association of Manufacturers
National Automobile Dealers Association
National Coalition of Petroleum Retailers

National Indian Business Association
National Small Business United
Non-Ferrous Founders' Society
Oklahoma Gas & Electric
Richard Romero
Small Business Survival Association
State of Michigan
State of Ohio
State of West Virginia

3. Respondents Carol M. Browner, Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency were the respondents in all of the proceedings below.

4. The following parties were intervenors in the cases whose judgment is under review.
   American Lung Association
   American Road and Transportation Builders Association
   Atlantic City Electric Company
   Commonwealth of Massachusetts
   State of New Jersey

5. The following parties appeared as *amici curiae* in the cases whose judgment is under review.
   Representative Tom Bliley
   Senator Orrin G. Hatch
   State of Connecticut
   State of New Hampshire
   State of New York
   State of Vermont

DISCLOSURE STATEMENT

1. Pursuant to Supreme Court Rules 24.1(b) and 29.6, the following list discloses the parent companies, and any publicly held company that owns 10% or more, of any party joining in this brief.

Alabama Power Company
(a subsidiary of Southern Company)
Appalachian Power Company
(a subsidiary of American Electric Power Company, Inc.)
Baltimore Gas and Electric Company
(a subsidiary of Constellation Energy Group, Inc.)
Carolina Power & Light Co.
(10% or greater owner: State Street Bank & Trust Co. Boston)
Central and South West Services, Inc.
(a subsidiary of Central and South West Corporation)
Central Illinois Public Service Company
(a subsidiary of Ameren Corporation)
Central Power and Light Company
(a subsidiary of Central and Southwest Corporation)
Columbus Southern Power Company
(a subsidiary of American Electric Power Company, Inc.)
Consumers Energy Company
(a subsidiary of CMS Energy Corporation)
Dayton Power & Light Company, The
(a subsidiary of DPL Inc.)
Detroit Edison Co., The

(a subsidiary of DTE Energy Co.)
Florida Power Corporation
(a subsidiary of Florida Progress Corporation)
Georgia Power Company
(a subsidiary of Southern Company)
Gulf Power Company
(a subsidiary of Southern Company)
Illinois Power
(a subsidiary of Dynergy, Inc.)
Indiana Michigan Power Company
(a subsidiary of American Electric Power Company, Inc.)
Indianapolis Power & Light Company
(a subsidiary of IPALCO Enterprises, Inc.)
Kennecott Energy and Coal Co.
(an indirect subsidiary of Rio Tinto PLC)
Kennecott Holdings Corporation
(an indirect subsidiary of Rio Tinto PLC)
Kennecott Services Company
(an indirect subsidiary of Rio Tinto PLC)
Kentucky Power Company
(a subsidiary of American Electric Power Company, Inc.)
Meridian Gold Co.
(a wholly-owned subsidiary of Meridian Gold, Inc.)
Mississippi Power Company
(a subsidiary of Southern Company)
Monongahela Power Company
(a subsidiary of Allegheny Energy, Inc.)
Newmont Gold Co.
(10% or greater owner: Newmont Mining Corporation)

Northern Indiana Public Service Company
(a subsidiary of NiSource Inc.)
Ohio Power Company
(a subsidiary of American Electric Power Company, Inc.)
Otter Tail Power Co.
(10% or greater owner: Otter Tail Power Co. ESOP)
Potomac Edison Company, The
(a subsidiary of Allegheny Energy, Inc.)
Public Service Company of Oklahoma
(a subsidiary of Central and Southwest Corporation)
Savannah Electric & Power Company
(a subsidiary of Southern Company)
South Carolina Electric & Gas Company
(a subsidiary of SCANA Corporation)
Southwestern Electric Power Company
(a subsidiary of Central and Southwest Corporation)
Tampa Electric Company
(a subsidiary of TECO Energy, Inc.)
Union Electric Co.
(a subsidiary of Ameren Corp.)
Virginia Power
(a subsidiary of Dominion Resources, Inc.)
West Penn Power Company
(a subsidiary of Allegheny Energy, Inc.)
West Texas Utilities Company
(a subsidiary of Central and South West Corporation)
Wisconsin Electric Power Company
(a subsidiary of Wisconsin Energy Corporation)

2. The following parties joining this brief have no parent corporations, and no publicly-held companies have a 10% or greater ownership interest in these parties.

American Chemistry Council (formerly Chemical Manufacturers Association)
American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
CINergy Corp.
Conectiv
Duke Energy Corp.
Edison Electric Institute
FirstEnergy Corp.
Jacksonville Electric Authority
Kansas City Power & Light Co.
LGE Energy Corp.
Madison Gas and Electric Co.
Midwest Ozone Group
Minnesota Power Company
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association (formerly National Petroleum Refiners Association)
National Rural Electric Cooperative Association
National Stone Association
Nevada Mining Association
Oglethorpe Power Corp.
Ohio Valley Electric Corp.
PacifiCorp

PP&L Electric Utilities Corporation dba PPL Utilities
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Electric Power Co.
Public Service Company of New Mexico
Salt River Project
Southern Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

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GLOSSARY

The following is a glossary of acronyms and abbreviations used in this brief.

Act	Clean Air Act
Administrator	Administrator of the United States Environmental Protection Agency
Agency	United States Environmental Protection Agency
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
OJA	Joint Appendix in D.C. Cir. Case No. 97-1441
ORTC	Response to Comments on the Proposed Ozone Rule

OSP	Ozone Staff Paper (1996)
PM	Particulate Matter
PM_{10}	Particulate Matter with an aerodynamic diameter less than or equal to 10 microns
$PM_{2.5}$	Particulate Matter with an aerodynamic diameter less than or equal to 2.5 microns
PMJA	Joint Appendix in D.C. Cir. Case No. 97-1440
PPM	Parts Per Million
PMSP	Particulate Matter Staff Paper
RIA	Regulatory Impact Analyses
Subpart 1	Subpart 1 of Part D of Title I of the Clean Air Act
Subpart 2	Subpart 2 of Part D of Title I of the Clean Air Act
UVB	Solar Ultraviolet "B" Radiation

BRIEF OF RESPONDENTS APPALACHIAN POWER COMPANY, ET AL.

This brief of Respondents Appalachian Power Company, *et al.*, is being filed in support of Petitioners American Trucking Associations, Inc., *et al.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 175 F.3d 1027, App. 1a. The opinions on the petitions for panel rehearing and suggestions for *en banc* rehearing are reported at 195 F.3d 4, App. 68a.

JURISDICTION

The court of appeals entered its judgment on May 14, 1999. Petitions for panel rehearing were granted in part and denied in part, and suggestions for *en banc* rehearing were denied on October 29, 1999. The petitions for certiorari were docketed on January 27 and 28, 2000. Conditional cross-petitions for certiorari were docketed on February 28, 2000, in accordance with S. Ct. R. 12.5. On May 22, 2000, the Supreme Court granted a writ of certiorari in Case No. 99-1257, and on May 30, 2000, the Supreme Court granted a writ of certiorari in Case No. 99-1426, ordering that these cases be argued "in tandem." This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Listed below are citations to the constitutional, statutory and regulatory provisions involved in this case. Their text is either set forth below, or in an Appendix (App. ___) to this Brief. On June 26, 2000, the Court granted the Solicitor

General's motion to dispense with printing a joint appendix in Case No. 99-1426.[1]

Article I, Section 1 of the United States Constitution provides in pertinent part that "All legislative Powers herein granted shall be vested in a Congress of the United States...."

The statutory provisions are: the Clean Air Act §§ 101, 42 U.S.C. 7401, App. 105a; 108, 42 U.S.C. 7408, App. 105a-108a; and 109, 42 U.S.C. 7409, App. 108a-111a; and the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 463, §§ 6101, 6102, App. 111a-115a.

The regulatory provisions are: 40 C.F.R. §§ 50.7, 50.9 and 50.10 (1999), App. 100a-103a.[2]

INTRODUCTION

Respondents Appalachian Power Company, *et al.*, do not question the importance of the Clean Air Act or the public health and environmental goals of that Act. As the Environmental Protection Agency ("EPA" or "Agency") continues to regulate air pollution to ever more stringent levels in response to uncertain predictions of health risk, however, the incremental health benefits of these regulations become harder to ascertain and the costs of erroneous or unnecessary regulations – including the risk of indirect health effects and excessive compliance costs – increase. We are concerned that, in such situations, failure to consider all of

[1] Copies of the Joint Appendix filed with the D.C. Circuit are available to the Court, and are referred to in this brief as "PMJA" (D.C. Cir. Case No. 97-1440) and "OJA" (D.C. Cir. Case No. 97-1441).

[2] On July 5, 2000, the Environmental Protection Agency promulgated a revision to 40 C.F.R. § 50.9(b). The revised language is found in the Appendix to this Brief at App. 104a.

the impacts of a regulatory decision on society may result in standards that do more harm than good for the public health.

This case concerns one such situation: the EPA Administrator's revision of National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM") under § 109 of the Clean Air Act ("CAA" or "Act"). In this case, EPA revised the existing NAAQS for ozone and PM, standards that EPA previously issued as "requisite to protect the public health" with an "adequate margin of safety" against the same health risks for which the Agency now believes more stringent standards are needed. CAA § 109(b). In both rulemakings, the Administrator was faced *not* with "demonstrated adverse effects" on the public, but rather with a range of uncertain predictions of "health risk."[3] Based on this record, the Administrator made a public health "policy" judgment that "uncertainties associated with inconclusive scientific and technical information" and "hazards that research has not yet identified" justified revised standards reflecting greater margins of safety. *See, e.g.*, 62 Fed. Reg. 38857, OJA 2; *id.* 38653, PMJA 3.

In making this decision, the Administrator concluded that the Act forbade her from considering factors that would allow her to make a reasoned public health policy judgment when confronted with the "uncertainties" and "inconclusive" information concededly at issue here. These prohibited factors include the indirect health, environmental and economic impacts of her decision. *See* 62 Fed. Reg. 38882,

[3] *Cf. Ethyl Corp. v. EPA*, 541 F.2d 1, 13-15 (D.C. Cir. 1976) (*en banc*) (comparing the "adverse effects" language of pre-1977 § 108(a), which "require[d] proof of demonstrable harm," with a "will endanger" standard comparable to that added to § 108(a) in 1977, which authorizes regulation in response to "significant risk of harm").

OJA 27; Brief For Respondent EPA, at 49-51 (D.C. Cir. No. 97-1441).

The Administrator's policy judgment, made with blinders to the overall consequences of those decisions, resulted in some of the most costly regulatory decisions ever made by a federal agency. The record indicates monetary costs to meet the new standards may be up to $150 billion each year,[4] almost an order of magnitude greater than the $18 billion total spent on medical research in the United States the year these standards were promulgated.[5] Equally important, efforts to attain these standards have potentially adverse public health and environmental effects, including an increased risk of premature mortality.

These tradeoffs are part of any sound risk management decision that promotes the public health. Based on a flawed interpretation of the CAA grounded in D.C. Circuit precedent, however, the lower court concluded that the Administrator must ignore these impacts on society when managing public health risk under § 109 of the Act. *See American Trucking Ass'ns v. EPA*, 175 F.3d at 1040, App. 18a (citing *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980)).

For the following reasons, this Court should reverse the D.C. Circuit's interpretation of the CAA in this case. The lower court's decision improperly prohibits EPA from exercising sound risk management judgment under CAA § 109 that will promote the public health. Furthermore, the Court should instruct EPA that it must consider the broad

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[4] Anne E. Smith, *et al.*, *Costs, Economic Impacts, and Benefits of EPA's Ozone & Particulate Standards* 9 (1997), OJA 3323.

[5] *See* U.S. Dept. of Commerce, *Statistical Abstract of the United States* 118, Table 163 (119th ed. 1999).

impacts on society of its regulatory decisions managing health "risks" through the NAAQS program, so that the Agency's NAAQS decisions will maximize the public good. We do not advocate that consideration of costs be substituted for consideration of health effects, but rather that EPA be required to consider all factors relevant to managing public health risk, in order that NAAQS decisions promote the public health consistent with the statutory purposes of the Clean Air Act.

STATEMENT

I. THE NAAQS PROGRAM

The purpose of the Act, as set forth in § 101(b)(1), is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and productive capacity of its population." This statutory language reflects congressional intent that Clean Air Act programs achieve a balance of social, economic and environmental considerations.

In CAA §§ 108 and 109, the operative regulatory provisions at issue here, Congress called for the establishment of NAAQS for air pollutants that may reasonably be anticipated to "endanger" public health or welfare. Under § 109(b)(1), primary NAAQS are to reflect a level of air quality "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health."[6]

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[6] Secondary NAAQS are to be set at a level that, in the Administrator's judgment, protects the public welfare from "known or anticipated adverse effects." CAA § 109(b)(2). In this case, EPA set secondary NAAQS at the same level as the primary NAAQS. Judicial review of both the

The "criteria" to which § 109(b) refers is an informational document that must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of *all identifiable effects* on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." CAA § 108(a)(2) (emphasis added). While the effects on "public health or welfare" addressed by the air quality criteria document must be related to the "presence of such pollutant in the ambient air," there are otherwise no other limits on the nature of the effects addressed by the criteria document. Rather, this document is to cover "*all* identifiable effects" on the "public health or welfare." *Id.* (emphasis added).

The criteria document is also to "include information on … those variable factors (including atmospheric conditions) which … may alter the effects on public health or welfare of such air pollutant." *Id.* § 108(a)(2)(A). Furthermore, § 108(b)(1) provides that "*[s]imultaneously with* the issuance of [the] criteria" document, EPA must issue information on the "cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact" of methods for pollution control or prevention. CAA § 108(b)(1) (emphasis added). All of this information is to be made available *before* EPA undertakes a NAAQS rulemaking.

Once NAAQS are set, the Administrator must review them and the underlying criteria document every five years and revise them "as may be appropriate" in accordance with §§ 108 and 109(b). CAA § 109(d)(1). To help with standard

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primary and secondary NAAQS was sought. The lower court remanded the secondary NAAQS to EPA along with the primary NAAQS. 175 F.3d at 1040, App. 18a.

revision, the Administrator appoints "an independent scientific review committee" to provide advice on the scientific basis for setting and revising NAAQS. This committee is to advise the Administrator on, among other things, additional knowledge required to determine the "adequacy" of existing standards and the "basis" for any revisions to them, and on "*any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance*" of revised NAAQS. CAA § 109(d)(2)(C) (emphasis added).

When the air quality standards program was initially enacted in 1970, the Senate Report described the NAAQS as reflecting a "reasonable degree of protection" in the face of uncertain science, rather than reflecting absolute protection from any and all predicted risks.[7] When it amended the Act in 1977, Congress emphasized the importance of protecting public health, but made clear that "public health" protection does not embrace a "no-risk philosophy" because that "ignores all economic and social consequences and is impractical."[8] In 1990, Congress extensively amended the Act, but did not amend § 109, § 108(a) or § 108(b).

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[7] S. Rep. No. 91-1196, at 10 (1970), *reprinted in* 1 Sen. Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of The Clean Air Amendments of 1970*, at 410 (Comm. Print 1974) [hereinafter *1970 Legis. Hist.*], OJA 3687.

[8] H.R. Rep. No. 95-294, at 127 (1977), *reprinted in* 4 Sen. Comm. on Env't and Pub. Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1977*, at 2594 (Comm. Print 1978) [hereinafter *1977 Legis. Hist.*], OJA 3678; *cf.* 123 Cong. Rec. 18458, 18463 (June 10, 1977), *reprinted in* 3 *1977 Legis. Hist.*, at 1038, OJA 3671 (Sen. Muskie) (When there is "no threshold on health effects … it [is] very difficult then to apply absolute health protection.").

II. EPA'S POLICY DECISION TO REVISE THE OZONE AND PM NAAQS

In the rulemakings at issue in this case, EPA replaced the existing 1-hour ozone NAAQS with a more stringent 8-hour standard.[9] EPA also replaced the existing particulate matter NAAQS based on a PM_{10} size indicator with standards for both fine particles ($PM_{2.5}$) and for coarse particles (PM_{10}).[10]

As the lower court explained, "EPA regards ozone definitely, and PM likely, as non-threshold pollutants, i.e., [pollutants] ... that have some possibility of some adverse health impact (however slight) at any exposure level above zero."[11] For each of these asserted non-threshold pollutants, EPA was presented with a choice among alternative standard levels characterized by uncertain estimates of health risk, a choice calling for the exercise of judgment regarding how to manage these predicted risks.[12] This is dramatically

[9] 62 Fed. Reg. 38873, 38894, OJA 18, 39.

[10] 62 Fed. Reg. 38677, 38679, PMJA 27, 29. The previous PM_{10} standard controlled both coarse and fine PM. The court of appeals vacated the coarse particle standard as arbitrary and capricious, *see* 175 F.3d at 1054-55, App. 52a, because the PM_{10} indicator included a variable amount of fine particulate matter. EPA has sought no further review of this ruling.

[11] 175 F.3d at 1034, App. 5a; *see also* Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner 2 (Nov. 30, 1995) [hereinafter CASAC Ozone Letter], OJA 237 ("[T]here is no threshold concentration for the onset of biological responses due to exposure to ozone above background concentrations."); EPA, *Review of the National Ambient Air Quality Standards for Particulate Matter* VI-16 (1996) [hereinafter *PMSP*], PMJA 2068.

[12] Risk management requires a regulator to consider predictions of risk and other information to decide on the need for and extent of risk reduction. *See* Stephen Breyer, *Breaking the Vicious Circle* 10 (1993).

illustrated by EPA's rulemaking addressing revision of the ozone NAAQS.

Ozone is a constituent of smog produced by complex chemical reactions in the atmosphere between volatile organic compounds ("VOCs") and nitrogen oxides ("NO_x") emitted by numerous sources over broad areas. The reactions that produce ozone take place over periods of days or longer, through a process influenced by sunlight and other changing atmospheric and meteorological conditions.

Further complicating ozone regulation, NO_x and VOCs that contribute to ozone formation are produced by natural as well as human sources. As a result, short-term (e.g., 1-to-8 hour) ambient ozone concentrations *average* about 0.03 to 0.05 ppm even at remote and rural sites, such as Denali, Glacier and Yellowstone National Parks, which are relatively uninfluenced by mobile and stationary sources. The upper range of short-term readings can exceed 0.07 ppm in such remote areas.[13]

Promulgation of the 1-Hour Ozone NAAQS – The ozone NAAQS that EPA revised in this rulemaking specified an ozone concentration level of 0.12 ppm, based on a 1-hour average, and allowed an average of one exceedance per year over a three-year period. When EPA set this standard in 1979, it did so based on its judgment that "there is no clear threshold... of adverse health effects," and that

[13] *See* EPA, *Review of National Ambient Air Quality Standards for Ozone* 20-21 (1996) [hereinafter *OSP*], OJA 1830-31; EPA, *Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Ozone* 94, 96 (1997) [hereinafter *ORTC*], OJA 176, 178. *See also* 44 Fed. Reg. 8212, OJA 3490 ("Field measurements at some remote sites, where man-caused ozone is likely to be negligible, have shown low – but not insignificant – rates of exceedances of the 0.08 ppm level.").

"physiological responses probably occur in extremely sensitive persons at very low levels."[14]

In 1993, EPA affirmed the appropriateness of this 1-hour NAAQS to address a broad range of predicted and theoretical health risks. In this 1993 decision, EPA was called upon to exercise risk management judgment in making a decision that promotes the "public health."

For example, the Administrator found that revision of the primary 1-hour NAAQS was *not* appropriate because changes in performance on lung function tests after ozone exposures at a 0.12 to 0.15 ppm level (e.g., temporary decreases in lung capacity of 9-16% accompanied by respiratory symptoms) "did not constitute adverse effects for purposes of section 109" even for "sensitive individuals," and health studies suggesting "aggravation of asthma and pre-existing respiratory disease" at 0.12 ppm were limited by "uncertainties about individual exposure levels and the role of other pollutants."[15] In other words, the Administrator found that not every predicted health risk or possible physiological effect associated with exposure to ozone was a potential adverse public health effect.

The Record for Revision of the Existing NAAQS – Following this 1993 decision to reaffirm the existing 1-hour NAAQS as "requisite to protect the public health" with an "adequate margin of safety," EPA in 1995 issued a revised ozone criteria document. In evaluating the new criteria document, the EPA staff explained that the public health

[14] 44 Fed. Reg. 8215, OJA 3493.

[15] 58 Fed. Reg. 13011, 13015, OJA 3452, 3456. These types of "uncertainties embedded in the regulatory process," of course, are a common feature of rulemaking and can lead to overly conservative or "random" regulation. Breyer, *supra* note 12, at 42, 48.

consequences of ozone exposures at levels consistent with the present 1-hour NAAQS remained highly ambiguous for both "chronic" and "episodic" effects.[16] Based on the revised criteria document, the EPA staff concluded that there was an "absence of discernible health effects thresholds and … that population risk [for respiratory symptoms, lung function changes, and hospital admissions] varies little with small changes in air quality."[17] On this basis, the staff concluded that a 0.09 ppm 8-hour standard (i.e., the 8-hour standard level that EPA concluded was roughly equivalent to the 0.12 ppm 1-hour NAAQS) "would reduce estimated exposures of the at-risk population sufficiently to provide some margin of safety."[18]

The staff concluded that the ranges of estimated risk were little different for the existing 1-hour and alternative 8-hour standards,[19] and that these risk estimates did not even reflect all of the uncertainties associated with the numerous assumptions made to develop the estimates.[20] For example,

[16] *See, e.g., OSP, supra* note 13, at 35, 39, 55, 61, 153, OJA 1845, 1849, 1865, 1871, 1963 (As the EPA staff observed, the database on ozone-induced bronchial responsiveness is "limited and uncertain"; ozone's impact on urban asthmatic morbidity is "not well understood"; no evidence was found that children exposed to low levels of ozone experience respiratory symptoms; the evidence of permanent structural changes in human lungs is "largely hypothetical"; and no association between 6 to 8 hour ozone exposure and hospital admissions could be assessed).

[17] *Id.* 141, OJA 1951.

[18] *Id.* 167, OJA 1977.

[19] *See id.* 125, 130, OJA 1935, 1940.

[20] *See id.* 116, 129-33, OJA 1926, 1939-43. *See also* R.G. Whitfield, *A Probabilistic Assessment of Health Risks Associated with Short-term Exposure to Tropospheric Ozone: A Supplement* 32-33 (1997), OJA 2363-

EPA's January 1997 revised risk assessment showed that the median risk of "large lung function decrements" *would be higher under an 8-hour standard* than under the existing 1-hour NAAQS in 2 of the 9 cities modeled, containing about one-third of the sensitive population,[21] and that risks of coughs and moderate lung function decrements (health "endpoints" considered by EPA) for the 1-hour NAAQS would be *lower* than the risks EPA found acceptable in December 1996, when it proposed a 0.08 ppm 8-hour NAAQS.[22] This EPA risk assessment also reported that risks "are not dramatically different ... among the alternative 1-hour and 8-hour standards" (including the existing 1-hour NAAQS).[23]

EPA's independent Clean Air Scientific Advisory Committee ("CASAC") reviewed the 1995 criteria document and related staff analyses. These independent science advisers concluded (1) that "our understanding of the health effects of ozone is far from complete"; (2) that there are "many gaps" in the science and "large uncertainties" in EPA's risk estimates; and (3) that "there is *no 'bright line'* which distinguishes *any* of the proposed standards (either the

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64 (discussing limitations of the modeling); R.G. Whitfield, *et al., A Probabilistic Assessment of Health Risks Associated With Short-Term Exposure To Tropospheric Ozone* 73 (1996), OJA 2312 (discussing "assumptions that could have systematically biased the results").

[21] *See* Memorandum from Harvey M. Richmond to Karen Martin 11 (Feb. 11, 1997) [hereinafter Richmond], OJA 2324; *OSP, supra* note 13, at 80, OJA 1891 (about 1 million out of 3 million "outdoor children" in the risk assessment live in Los Angeles or Houston).

[22] Richmond, *supra* note 21, at 10, OJA 2323.

[23] *Id.* 5, OJA 2318 ("[C]onsidering the uncertainties ... [any] differences [in risk estimates] are not large.").

level or the number of allowable exceedances) as being significantly more protective of public health."[24]

Like the record for the ozone rulemaking, the record for review of the PM NAAQS was characterized by uncertainty about the magnitude and cause of any health risks. For example, the EPA staff "emphasize[d] the *unusually large* uncertainties associated with establishing standards for PM relative to other single component pollutants for which NAAQS have been set."[25] CASAC members could form no consensus regarding the level, averaging time, or form of a revised standard because of the many uncertainties regarding both the existence and nature of any causal relationship between public health and the $PM_{2.5}$ indicator.[26] Reflecting concerns with the lack of air quality data and uncertainty regarding the constituents of $PM_{2.5}$ that should be regulated, the President directed EPA to postpone implementation of the revised $PM_{2.5}$ NAAQS until adequate air quality data were collected and a further review of the standards was completed.[27] Congress subsequently ratified that directive.[28]

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[24] CASAC Ozone Letter, *supra* note 11, at 1, 3, 4, OJA 236, 238, 239 (emphasis added).

[25] *PMSP, supra* note 11, at VII-41, PMJA 2153 (emphasis added). For further description of the uncertainties in the PM rulemaking record, see generally, Brief of Petitioners American Trucking Associations, Inc., *et al.*, 11-19 (No. 99-1426), and see also Brief in Response for Respondents National Stone Association, *et al.*, at 2-4 (Nos. 99-1257, 99-1263, 99-1265).

[26] Letter from George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner 2-3 (June 13, 1996), PMJA 3162-63. Moreover, only 2 of the 21 members of the CASAC panel, specifically supported the stringent annual $PM_{2.5}$ standard adopted by EPA. *See id.*, Table 1, PMJA 3165.

[27] 62 Fed. Reg. 38421, PMJA 195.

[28] Transportation Equity Act for the 21st Century § 6101, Pub. L. No. 105-178, 112 Stat. 463 (1998), App. 111a-113a.

EPA's Decisions to Revise the NAAQS – EPA's decisions here were *not* driven by demonstrated health effects caused by small exposures to the pollutants in question, but rather by uncertain estimates of health risk. Reflecting these uncertain risk estimates, the Administrator explained that her decisions on revised NAAQS were the product of "policy" judgment.[29] According to the Administrator, these "policy" judgments represented the degree of protection she declared was "sufficient[]" in light of "[u]ncertainties associated with inconclusive scientific and technical information" and "hazards that research has not yet identified."[30]

The Administrator explained that the level of public health protection that she deemed sufficient for the revised NAAQS was "largely judgmental in nature, particularly with respect to non-threshold pollutants, and *may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric.*"[31] In exercising this "judgment," the Administrator considered "the nature and severity" of predicted health effects, "the size of the sensitive populations at risk," and the "kind and degree of uncertainties."[32] Having said this, the Administrator never explained how consideration of these factors justified a change in the management of predicted risks addressed by the then-current standards, or how the revised standards would fulfill the

[29] *See* 62 Fed. Reg. 38857, 38859, 38861, 38862, 38863, 38867, 38869 n.23, OJA 2, 4, 6, 7, 8, 12, 14; *id.* 38653, 38668, 38669, 38671, 38672, PMJA 3, 18, 19, 21, 22.

[30] 62 Fed. Reg. 38857, OJA 2; *see id.* 38863, 38867, OJA 8, 12; *id.* 38653, PMJA 3.

[31] 62 Fed. Reg. 38883, OJA 28; *id.* 38688, PMJA 38 (emphasis added).

[32] *See supra* note 31.

purposes section of the Act. 175 F.3d at 1034-36, App. 5a-9a; *see also id.* 1034-35, App. 6a-7a (*citing* 62 Fed. Reg. 38883, OJA 28). To the contrary, according to the Administrator, "nothing in the statute requires her to make any specific 'findings,'" even a finding of "significant risk."[33]

In contrast to the uncertain and inconclusive nature of the Administrator's predictions of health risk, the records for these rulemakings made quite clear that EPA's standards would have profound impacts on society, and might be impossible to attain. According to the Administrator, however, her judgment regarding standard revision could *not* be informed by consideration of any information related to their collateral health, social or economic consequences.[34]

For example, as part of its decision adopting the revised 8-hour NAAQS, EPA promulgated a rule requiring the development of a new, more stringent ozone reduction program under Subpart 1 of the Act, in place of the program that Congress had adopted when it enacted Subpart 2 in 1990.[35] Because the new Subpart 1 program based on the

[33] Brief of Respondent EPA, at 43 (D.C. Cir. No. 97-1441).

[34] 62 Fed. Reg. 38878-80, OJA 23-25; *ORTC*, *supra* note 13, at 123-24, 128-33, OJA 205-06, 210-15.

[35] 62 Fed. Reg. 38873, OJA 18, *as revised in 1-Hour Ozone Standard: Reinstatement: Final Rule* (reinstating the 1-hour ozone standard and Subpart 2 requirements only until the legal status of the 8-hour standard is resolved). App. 104a. Subpart 1 appears at CAA §§ 171-179B. The Subpart 2 program that Congress added in 1990 spelled out a detailed and comprehensive program addressing what could, and could not, be required to reduce ozone to address the public health concerns associated with the existing 1-hour NAAQS. *See* CAA §§ 181-185B.

revised 8-hour NAAQS would "require significantly different emission reduction targets" in some areas,[36] it would disrupt existing control programs and attainment deadlines established in Subpart 2 of the Act – requirements that Congress established to address the same uncertain predictions of health risk that EPA would now address through a Subpart 1 program based on the revised 8-hour NAAQS.[37] Areas with severe nonattainment problems like Los Angeles and Houston would be thrown back into the failed pre-1990 paradigm where unrealistic planning deadlines under Subpart 1 led to regulatory paralysis.[38]

Like the 1-hour ozone NAAQS, the existing PM NAAQS was reducing particulate concentrations around the country.[39]

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[36] *See, e.g.*, EPA, *Regulatory Analyses for the Particulate Matter and Ozone National Ambient Air Impact Quality Standards and Proposed Regional Haze Rule* 7-2, 7-5, 9-3 [hereinafter *RIA*], OJA 2930-31, 2935.

[37] Several of EPA's science advisers recommended against having both 1-hour and 8-hour NAAQS because of the confusion it would cause for achieving ozone reductions. *See, e.g.*, CASAC Transcript of March 22, 1995, at 303, 308, OJA 280, 282 (remarks of James Price and George Wolff). *See also OSP*, *supra* note 13, at 147, OJA 1957 (noting "adequate reduction in risks" can be achieved with either a 1-hour or 8-hour standard).

[38] *See, e.g.*, 136 Cong. Rec. H12867 (daily ed. Oct. 26, 1990) (Rep. Fields) *reprinted in* 1 Sen. Comm. on Env't & Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990*, at 1236 (Comm. Print 1993) [hereinafter *1990 Legis. Hist.*], OJA 3543 (the Subpart 2 provisions "address the failure of our nonattainment areas to achieve ambient air quality deadlines in existing law.... We have not, however, simply continued to tell the states to do a plan to clean the air. That did not work.").

[39] *See* 62 Fed. Reg. 38666, PMJA 16 (noting the success of the earlier PM NAAQS and "the continued improvement in air quality through the current [PM_{10}] standards").

In contrast to this successful NAAQS program, implementation of the revised $PM_{2.5}$ NAAQS would be impeded by a lack of air quality data and uncertainty as to what constituents of $PM_{2.5}$ should be regulated to reduce predicted health risks.[40] Reflecting these problems, the President and Congress postponed implementation of the revised NAAQS until after the next five-year review cycle, and until after a decision was made on "whether to revise or maintain the new standards."[41]

Besides threatening to disrupt ongoing pollution reductions under the existing NAAQS, the record showed that, by EPA's own admission, the costs of full attainment of the revised ozone NAAQS (estimated by EPA at an additional $9.6 billion per year over the existing NAAQS) would outweigh its benefits (estimated by EPA at $1.5 to 8.5 billion per year).[42] EPA's own estimates showed the cost of attaining the revised particulate standards was extraordinarily high, as much as $37 billion each year.[43]

The record also showed that these costs would reduce average real after tax incomes by 1-2% per person, with the

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[40] *See id.* 38667, 38675 n.38, PMJA 17, 25 (noting the need for additional research "to better identify which species are of concern for human health, and the sources and relative magnitude of such species" and for additional air quality monitoring).

[41] 62 Fed. Reg. 38421, PMJA 195; Transportation Equity Act for the 21st Century, § 6101, Pub. L. No. 105-178, 112 Stat. 463 (1998). App. 111a-113a.

[42] *See RIA, supra* note 36, at ES-11 to ES-12, ES-17, 9-1, OJA 2918-19, 2924, 2934.

[43] *Id.* at 9-1, OJA 2934. Other estimates of the costs of the revised NAAQS ranged up to $150 billion *annually*. Smith, *et al.*, *supra* note 4, at 9, OJA 3323.

impact falling disproportionately on lower income groups. The increased costs and unemployment resulting from the NAAQS therefore would themselves create public health risk,[44] with risk estimates ranging up to 27,000 premature deaths.[45] The revised NAAQS would also prevent highway improvements that were expected to save lives.[46] Even at these extraordinarily high costs, EPA was unable to identify

[44] *See* Ralph L. Keeney, *Mortality Risks Induced By Economic Expenditures*, 10 Risk Analysis 147, 157 (1990) (If the intent of an air quality standard is avoiding adverse public health effects, it is "ridiculous not to consider the potential mortality [and morbidity] implications of implementing the regulation itself."). *See generally* Breyer, *supra* note 12, at 20; W. Kip Viscusi, *The Value of Life in Legal Contexts: Survey and Critique*, 2 Am. L. & Econ. Rev. 195, 200 (2000) (explaining that regulations may create both direct and indirect health risks).

[45] Ralph L. Keeney & Kenneth Green, *Estimating Fatalities Induced By Economic Impacts of EPA's Ozone and Particulate Standards* 13 (1997), OJA 3328. This estimate is based on higher costs for attaining the standards than EPA projects. Up to 1600 predicted fatalities were estimated even under EPA's artificially low cost estimates. *Id.; see also Clean Air Act: Ozone and Particulate Matter Standards: Hearings Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety and the Sen. Comm. on Env't and Pub. Works*, S. Hrg. No. 105-50, pt. 2, at 162 (1997) (prepared statement of Susan E. Dudley, Vice President and Director of Environmental Analysis, Economics, Inc.) (attaining the proposed ozone NAAQS could increase deaths by 4250 to 5667 per year).

[46] *Cf. Hearings on Conformity Under the Clean Air Act Before Sen. Comm. on Env't and Pub. Works*, 106th Cong. 29-30 (1999) (statement of Jim L. Joyner, Chmn. Bd. of Commissioners, Henry County, Georgia) (explaining that Clean Air Act transportation conformity requirements related to implementation of NAAQS are impeding safety-related road construction projects).

control techniques that would bring about nationwide attainment.[47]

Finally, the record showed that revising the existing ozone NAAQS might also increase public health risk through increased incidence of cataracts and cancers associated with increased UVB radiation exposure.[48] And more restrictive NAAQS could increase unemployment, electricity rates, and the costs of food and other consumer products.[49]

As a result, EPA's decisions to revise the existing NAAQS would (1) impose billions of dollars more in costs on society, (2) increase indirect public health risk, (3) in the case of the ozone NAAQS, be implemented in a manner rejected by Congress, and (4) in the case of the PM NAAQS, not be implemented at all until after the next 5 year review of that NAAQS. The Administrator refused to consider any of these consequences of her decision, however, on the grounds that

[47] According to the Administrator, the expenditures assumed in EPA's regulatory analyses – up to $10,000 per ton for the removal of ozone precursor pollutants and up to $1 billion/$\mu g/m^3$ of ambient $PM_{2.5}$ eliminated – were insufficient to provide attainment. *RIA, supra* note 36, at ES-11 to ES-12, OJA 2918-19; *see also* American Petroleum Institute, *Comments on Proposed NAAQS for Ozone*, Appendix B (1997), OJA 3293-3301.

[48] Randall Lutter & Christopher Wolz, *UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standards*, 31 Env. Sci. & Tech. 141, 145 (1997), OJA 2764 (estimating an increase of 25-50 melanoma deaths, 2000 to 11000 skin cancers and 13000 to 28000 cataracts from a reduction in seasonal average ozone levels of 10 parts per billion).

[49] *See, e.g.*, American Farm Bureau Federation, Comments 1-3 (Mar. 12, 1997), OJA 3318-20 (impacts on agricultural sector and increased food prices); Tennessee Valley Authority, Detailed Comments 10 (Mar. 11, 1997), OJA 3317 (11% increase in electric rates and job loss).

she had no statutory authority to consider them, even though EPA purportedly was exercising "policy" judgment to protect the "public health."[50] Indeed, according to the Administrator, even information showing that implementation of a revised NAAQS will be "difficult, counter-productive or confusing do[es] not undermine EPA's [NAAQS] revision authority."[51]

III. THE D.C. CIRCUIT'S DECISION

Because the Agency had interpreted the Act to authorize it to exercise judgment with no guiding principle, the court below remanded the revised standards to EPA for further rulemaking. According to the court, the Agency is obligated to interpret the Act to provide an "intelligible principle" for her exercise of risk management judgment. 175 F.3d 1034, App. 5a.

The lower court also held that EPA must consider *all* effects of an air pollutant in the ambient air – whether adverse or beneficent – when selecting an appropriate NAAQS. *Id.* 1052-53, App. 47a-48a.[52] At the same time, however, the court briefly and emphatically rejected the suggestion that, in developing an intelligible principle to guide its risk management judgment, the Agency may consider factors such as indirect public health and environmental impacts and costs, factors that any rational

[50] 62 Fed. Reg. 38878-85, OJA 23-30; *id.* 38683-88, PMJA 33-38.

[51] Brief of Respondent EPA, at 73 (D.C. Cir. No. 97-1441).

[52] Thus, the lower court directed EPA to consider the scientific evidence that ozone in the ambient air protects against the effects of UVB radiation. EPA did not petition this Court for review of that aspect of the lower court's decision.

person would consider relevant to determining the acceptable level of public health risk.[53]

Quoting earlier decisions of the circuit, the court concluded that this issue was resolved "in *Chevron* step one terms," because the CAA "on its face does not allow consideration of technological or economic feasibility." *Id.* 1040, App. 19a. According to the court, this prohibition on the factors the Administrator may consider in exercising "public health" risk management judgment extends not only to the costs and feasibility of control technologies, but to all the indirect health, environmental and economic impacts that might be caused by a decision to revise an existing NAAQS.

Although the court below made minor modifications to its opinion on rehearing, 195 F.3d 10, App. 79a-80a, it did not change its holding limiting the factors EPA can consider in managing public health risk.

SUMMARY OF ARGUMENT

Section 109 of the Clean Air Act directs the EPA Administrator to set NAAQS that are "requisite to protect the public health" with an "adequate margin of safety," and to make such revisions to those standards as may be "appropriate in accordance with [§§ 108 and 109(b)]." Such standards must be supported by a sound scientific record. In revising the NAAQS for ozone and PM, the Administrator relied on uncertain predictions of health risk to adopt revised standards that will set in motion two of the most costly and

[53] 175 F.3d at 1040, App. 18a-20a. The only example the court gave of how EPA could develop a "principled structure" for setting NAAQS, however, was Oregon's Medicaid program, a program that relied on cost considerations. *Id.* 1039, App. 15a-18a.

burdensome regulatory programs ever required by a federal administrative agency.

Citing uncertain "risk" estimates and reflecting the assumed lack of any level of exposure at which there is an absence of health risk, the Administrator's decisions to revise the NAAQS were "largely judgmental in nature... and may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." 62 Fed. Reg. 38883, OJA 28 (emphasis added); *id.* 38688, PMJA 38 (emphasis added). The costs of these standards, however, can be measured both in the potential for adverse impacts on public health and the environment, and in the dollars required to attain them (up to $150 billion each year). EPA concedes that the revised ozone NAAQS have costs that may exceed their benefits, and that NAAQS will interfere with a separate congressional program for reducing ozone to address the health risks at issue here.

In revising these NAAQS, the Administrator concluded that she was precluded from considering the indirect health, environmental and economic effects of her policy decision to provide additional margin of safety in response to uncertain health risk – factors that would normally be relevant to sound "public health" policy judgment. The United States Court of Appeals for the District of Columbia Circuit agreed that the Administrator had no authority to consider such factors, relying on its own precedents with *Lead Industries Association v. EPA,* 647 F.2d 1130 (D.C. Cir. 1980). This decision should be reversed.

1. Broad delegations of regulatory authority must be implemented to give effect to congressional purpose, absent statutory language directing a different result. In the Clean Air Act, Congress specified through explicit statutory language that the goal of the Act is to promote the "public

health" which, by its very definition, includes consideration of economic and social realities. The language of § 101(b)(1) of the Act, according to EPA itself, calls for a "balancing of the social and economic considerations with the environmental implications" of a regulatory decision. 39 Fed. Reg. 31000. This Court's precedents have long recognized that the normal meaning of statutory terms as well as the statutory purposes must be used to provide decisional criteria where statutory terms are undefined, unless there is clear statutory evidence requiring a different result. There is no such evidence here.

2. Section 109(b)(1) of the Clean Air Act, directs the Administrator to establish standards at a level "requisite" to protect the "public health" with an "adequate margin of safety." When confronted with predicted but uncertain health risk, as opposed to a demonstrated "adverse effect" on public health, these terms call for the exercise of risk management judgment that involves balancing a broad range of factors consistent with the statutory purposes section of the Act.

a. None of this statutory language directs the Administrator, in exercising this risk management judgment, to ignore factors such as the total health, environmental, and economic consequences of actions that are critical to protecting and promoting the public health. Indeed, consideration of these factors is consistent with the common understanding of "public health" regulation, which contemplates a balancing of factors to improve the conditions in which people live. Consideration of these factors also is essential to fulfilling the Clean Air Act's overriding statutory purpose of protecting the public's health in a way that also promotes the "public welfare" and the "productive capacity" of the people of this country. Finally, the common approach to establishing an "adequate margin of safety" requires

considering both the costs and the benefits of the margin in question.

b. Furthermore, § 109(d)(1) of the Act directs EPA to revise NAAQS "as may be appropriate in accordance with" §§ 108 and 109(b). Those sections then tell the Administrator, as part of this standard revision process, to obtain from her science advisors information on the overall impacts on society of standard revisions. This is consistent with congressional intent that the Agency exercise its judgment to manage public health risk in a manner that promotes the statutory purposes.

c. The Act's legislative history confirms that Congress expected the Administrator to consider practical impacts including societal costs to determine whether the risk posed by a pollutant such as ozone or PM is unacceptable or whether standard revisions were "appropriate." Congress understood that NAAQS were *not* intended to be standards *which eliminate any and all health risk*. Rather, Congress observed in 1970 when it enacted §§ 108 and 109, and again in 1977 when it amended §§ 108 and 109, that these provisions do *not* contemplate "zero risk" regulation, but rather a "reasonable degree of protection."

3. Finally, review of the language, structure and purposes of the Act shows that the circuit precedent on which the lower court relied – *Lead Industries* – was wrongly decided. There is no statutory language providing, as the *Lead Industries* court concluded, that costs and other impacts may "play no part in the promulgation of [NAAQS]." 647 F.2d at 1148. Rather, applying this Court's subsequent decision in *Chevron*, this Court should conclude that, consistent with the congressional purposes stated in § 101(b) of the Act, the statute on its face contemplates consideration

by EPA of the broad impacts on society of its NAAQS decisions when it manages health risks under § 109.

ARGUMENT

The standards before the court are standards that protect against predicted "risk" from pollution, not against pollution that has been shown to cause an adverse public health "effect" like the London "killer fog."[54] Under the Act, NAAQS must be set below the level at which such demonstrated adverse public health effects occur. This case, by contrast, involves pollution levels far below those at which adverse public health effects have been demonstrated. What is at issue here is how EPA manages health "risks."

In making decisions to manage risks (as opposed to eliminating known, adverse public health effects), EPA must act like any other agency with "public health" risk management responsibilities. A mandate to protect the "public health" does not contemplate elimination of all health risk, or absolute protection of any particular individual.[55]

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[54] Historically, increased mortality and morbidity has been observed during episodes of extremely high levels of air pollution *PMSP*, supra note 11, at V-11, PMJA 1962. With fine particles, for example, such effects have been observed with levels reaching 500-1000 $\mu g/m^3$ or more daily. 61 Fed. Reg. 65641-42 & n.7, PMJA 122-23. This is at least an order of magnitude higher than daily fine PM levels observed today in this country. *See PMSP*, *supra* note 11, at IV-17a, PMJA 1943. By contrast, the studies on which the new standards are based used statistical techniques to predict the possibility that health effects *might* occur at ambient concentrations extending down to background levels.

[55] *See* H.R. Rep. No. 95-294, at 127, *reprinted in* 4 *1977 Legis. Hist.*, *supra* note 8, at 2594, OJA 3678 (a "no-risk philosophy ... ignores all economic and social consequences and is impractical"); 123 Cong. Rec. at 18463 (Sen. Muskie), *reprinted in* 3 *1977 Legis. Hist.*, *supra* note 8, at 1038, OJA 3671; *see also Black's Medical Dictionary* 454 (Gordon

Indeed, EPA agrees that not every predicted "health risk" is a "*public health*" risk.[56]

Rather, as traditionally understood by public health professionals, "many factors such as the social, economic and physical environment in which the people live" can affect the public's health.[57] Regulation that addresses public health risk therefore "operates in a world of choices in the allocation of limited resources,"[58] and contemplates a focus on

Macpherson, ed., 39th ed. 1999) ("Central to understanding public health is recognition that public-health practitioners are concerned not just with individuals, but with whole populations and that improving health care plays only a part of public-health improvement.").

[56] *See* 62 Fed. Reg. 38677, PMJA 27 (noting that the level of the new daily $PM_{2.5}$ standard "is not risk free"); *see also supra* note 15 (discussing 1993 decision to reaffirm the 1-hour NAAQS).

[57] *See, e.g.*, Ben Miller & Claire Brackman Keane, *Encyclopedia and Dictionary of Medicine and Nursing* 410 (1972) (public health is the "field of medicine that is concerned with... the physical, mental and social well-being of the community as a whole"); *Dorland's Illustrated Medical Dictionary* 647 (L.R.C. Agnew *et al.* eds., 24th ed. 1965) (Health is "[a] state of complete physical, mental and social well-being, and not merely the absence of disease and infirmity."); *Black's Medical Dictionary, supra* note 54, at 454; *see also id.* 242 ("Environment, *including living and working conditions*, plays an important part in determining a person's health.") (emphasis added); Roger Detels & Lester Breslow, *Current Scope and Concerns In Public Health in* 1 *Oxford Textbook of Public Health* 3, 3 (Roger Detels et al. eds., 3d ed. 1997) (public health concerns dating back to the early twentieth century include crowding and undernutrition as well as disease).

[58] Lawrence O. Gostin, *et al.*, *The Law and The Public's Health: A Study of Infectious Disease Law in the United States*, 99 Colum. L. Rev. 59, 68 (1999).

"fulfill[ing] society's interest in assuring conditions in which people can be healthy."[59]

As such, "public health, as both a goal and a practice, is as inherently political (i.e., concerned with the allocation of resources in society) as it is technological (i.e., concerned with deployment of professional knowledge of illness)."[60] Developing public health policy necessarily involves tradeoffs in order to choose the risk management option that produces the greatest value for society.

In this case, citing a flawed interpretation of the CAA in the lower court's 1980 *Lead Industries* decision, the D.C. Circuit held that Congress prohibited the EPA from considering factors that are necessary to sound public health risk management judgment in setting or revising NAAQS. For the following reasons, this result is neither consistent with the Act nor logical, and may result in decisions that do *not* promote the public health.

I. THE STATUTORY PURPOSES MUST INFORM AN AGENCY'S IMPLEMENTATION OF A BROAD CONGRESSIONAL DELEGATION.

Broad delegations of congressional authority must be implemented in a manner consistent with the ordinary meaning of undefined statutory terms,[61] and in a manner that furthers Congress' overall purposes in enacting the legislation. As the Court only recently explained, "in the absence of a statutory definition," courts should look to "both the generally accepted meaning of the term and to the

[59] *See* Institute of Medicine, *The Future of Public Health* 7, 40 (1988).

[60] Gostin, *supra* note 58, at 68.

[61] *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

purpose of the statute."[62] Furthermore, a court's "obligation is to give effect to congressional purpose so long as the congressional language does not bar that result."[63]

Thus, where Congress has not provided detailed guidance for implementation of a statutory provision, this Court has analyzed the validity of an agency's regulation by examining its conformance with the "fundamental objective" of the statute in question.[64] Only last term, in striking down a regulatory program adopted by the FCC, this Court emphasized that broad delegation of regulatory authority requires the agency "to apply *some* limiting standard rationally *related to the goals of the Act*."[65] Indeed, the failure to apply any limiting standard related to the goals of the Act may raise concerns under the congressional nondelegation doctrine.[66]

As early as 1967, in enacting the first Air Quality Act, Pub. L. No. 90-148, 81 Stat. 485, Congress explained that the development of air quality standards should "be influenced

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[62] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47-48 (1989).

[63] *Johnson v. United States*, 120 S.Ct. 1795, 1805 n.10 (2000)(citations omitted).

[64] *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11-12 (1980).

[65] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) (emphasis added).

[66] *Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."); *Jones v. United States*, 120 S.Ct. 1904, 1911 (2000) (statute is to be construed to avoid constitutional infirmity).

not only by a concern for the protection of health or welfare, but also by economic, social and technological considerations."[67] In amending the Act in 1977, Congress again emphasized that the Act's purpose was to "insure the protection of the public health and the environment ... *while at the same time considering the energy and economic needs of this Nation*."[68]

Reflecting these principles, Congress has long recognized, in explicit *statutory* language, that the fundamental objective of the Act is to promote the "public health" consistent with economic and social realities. Thus, Congress stated in § 101(b) of the Act that the purpose of the Act is "to protect and enhance the quality of the Nation's air resources *so as to promote* the *public health* and *welfare* and the *productive capacity* of its population." CAA § 101(b)(1) (emphasis added).

The Agency itself has explained the importance of exercising its discretion in light of the Act's stated goal "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[69] As EPA has observed, this language contemplates "a balancing of the social and economic considerations with the environmental

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[67] S. Rep. No. 90-403, at 28 (1967).

[68] H.R. Rep. No. 95-294, at 34-35 (1977), *reprinted in* 4 *1977 Legis. Hist.*, *supra* note 8, at 2501-02 (emphasis added).

[69] *See* 39 Fed. Reg. 31000; *see also Lead Industries*, 647 F.2d at 1152; *Chrysler Corp. v. EPA*, 631 F.2d 865, 888 (D.C. Cir. 1980); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1572 n.15 (D.C. Cir. 1984).

implications" of a decision in order "to fulfill the mandate" of the Act.[70]

Framing EPA's responsibilities to accommodate these statutory objectives does not call for the Administrator to ignore the broad impacts on the public of alternative approaches. Rather, it calls for balancing to ensure that the Agency's judgments reflect sound public health policy.

These statutory purposes have special relevance in the context of a regulatory program calling on the Agency to exercise "public health" risk management judgment, a term which by its very definition contemplates consideration of the social and economic realities of an agency's risk management decision. Thus, for example, regulation that trades reduction in some predicted health risks for increases in others may not further the "public health." Similarly, adopting a revised NAAQS that makes implementation of an air quality standard "difficult, counterproductive or confusing"[71] may not promote the "public health." And increasing the costs of regulation to society in an attempt to insure against speculative risk may in fact impair, not protect, the "public health."[72]

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[70] 39 Fed. Reg. 31000. Indeed, the court of appeals itself illustrated the overriding importance of the purposes section of the Clean Air Act by ruling that section 101(b)(1) imposed upon the Administrator the obligation to establish a regulatory program that was not mentioned in the operative provisions of the Act. *See Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976), *vacated sub nom. Montana Power Co.* v. *EPA*, 434 U.S. 809 (1977); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd per curiam*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

[71] Brief of Respondent EPA, at 73 (D.C. Cir. No. 97-1441).

[72] Some studies suggest that $3 million to $7 million spent on regulatory costs may lead to one additional premature death. *See* Mark Shere, *The*

A profligate commitment of money and technology to guard against one set of uncertain health risks may result in inadequate means to cope with other more serious problems.[73] Indeed, without consideration of the unavoidable relationship between the costs of goods produced and the capacity of the public to purchase such goods, stringent margins of safety designed to protect against *hypothetical risks* that by their nature are uncertain could have the effect of increasing the cost of – and perhaps even denying to the poor and those on fixed incomes – products such as electricity for heating and cooling that are essential to the public's health. As Justice Powell recognized in his concurrence in *Union Electric Co. v. EPA*, for example, the "shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in ambient air quality." 427 U.S. 246, 272 (1976).

In this case, EPA must construe the Act to apply "some limiting standard, rationally related to the goals of the Act"[74] to govern its exercise of public health risk judgment, unless

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Myth of Meaningful Environmental Risk Assessment, 19 Harv. Envtl. L. Rev. 409, 472 nn. 271-72 (Winter 1995) ((*citing International Union, UAW v. OSHA*, 938 F.2d 1310, 1326 (D.C. Cir. 1991) (Williams, J., concurring) (explaining that recent studies predict that "each $7.5 million of costs generated by regulation may … induce one [premature] fatality" in the public through reduced availability of resources for medical care and safety)).

[73] *See, e.g., Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 669-70 (1980) (Powell, J., concurring); Stephen Breyer, *supra* note 12, at 18-19; *see also* W. Kip Viscusi, *The Value of Life in Legal Contexts: Survey and Critique*, 2 Am. L. & Econ. Rev. 195, 200-01 (2000).

[74] *AT&T Corp.*, 525 U.S. at 388.

this Court finds that Congress explicitly directed EPA to ignore the statutory language defining the purposes of the Act.[75] Because, as discussed below, there is no such explicit constraint on the Agency's regulatory authority in § 109 of the Act, the Agency must look to the concept of "public health" as commonly understood by health professionals and to the purposes section of the Act in formulating decisional criteria to govern management of uncertain health risks under CAA § 109.

II. CONGRESS IN § 109 CONTEMPLATED THAT EPA WOULD CONSIDER THE BROAD IMPACTS ON SOCIETY OF ITS PUBLIC HEALTH RISK MANAGEMENT DECISIONS CONSISTENT WITH THE PURPOSES OF THE ACT.

No one disputes that the NAAQS program has truly extraordinary impacts on the Nation's economy and on society generally. EPA's own analyses show that the revised standards at issue represent perhaps the most costly regulatory decision ever made by that agency.[76] In addition to these very high implementation and control costs, the types of impacts include adverse health impacts associated with increased UVB radiation exposure; increased unemployment; the higher cost of essential products; disruption in the implementation of the congressional ozone reduction program; and disruption of highway safety programs. *See supra* pp. 15-18. Furthermore, EPA has explained that the

[75] *See Johnson*, 120 S.Ct. at 1805 n.10; *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (The first inquiry for a reviewing court is whether "Congress has directly spoken to the precise question at issue.").

[76] *See RIA, supra* note 36, at ES-13, ES-19, 7-11, 9-1 (1997), OJA 2920, 2926, 2932, 2934.

revised NAAQS may simply be impossible to achieve in some areas.

These, of course, are the types of concerns that led Congress in 1990 to amend the Act to establish the Subpart 2 program for managing the uncertain public health risks addressed by the 1-hour ozone NAAQS.[77] And concerns about implementation and efficacy of the revised standards also caused Congress to delay implementation of the revised $PM_{2.5}$ NAAQS.[78]

The lower court has held that EPA has no statutory authority to consider any of these impacts when exercising public health risk management judgment under § 109. But there is nothing on the face of either §§ 108 and 109 that prohibits the Administrator from balancing the broad range of factors called for in § 101(b)(1) of the Act in exercising her risk management judgment. To the contrary, the language of §§ 108 and 109 supports the use of the statutory purposes to derive decisional criteria for the Administrator's exercise of risk management judgment.

A. Sections 108 and 109(b) Do Not Mandate Uninformed Public Health Risk Management Decisions.

Under § 109, NAAQS are to be set at a level that, in the "judgment" of the Administrator, is "requisite to protect public health" allowing an "adequate" margin of safety. Nothing in this language tells the Administrator to exercise

[77] H.R. Rep. No. 101-490, pt. 1, 101st Cong., 2d Sess., at 146-47 (1990), *reprinted in* 2 *1990 Legis. Hist., supra* note 38, at 3170-71, OJA 3556-57.

[78] *See* Transportation Equity Act for the 21st Century § 6101(b)(3), Pub. L. No. 105-178, 112 Stat. 463 (1998). App. 113a.

her risk management judgment with blinders to the broad consequences for society of her decisions.

The plain meaning of the word "requisite" is "indispensable" or "necessary,"[79] suggesting that the Administrator must establish a *need* for the revised standard to protect public health.[80] Furthermore, as discussed above, the concept of "public health" calls on regulators to promote the overall health of the population by reducing predicted risks to acceptable levels. *See supra* pp. 24-27.

Whether a standard is "requisite" to protect the "public health" in the face of uncertain predictions of health risk, therefore, does not on its face limit the factors relevant to the Agency's exercise of risk management judgment. To the contrary, a standard cannot be "requisite" to protect the "public health" without some understanding of whether and why predicted health risks are *unacceptable* under the *existing* standard, and yet *acceptable* under the *revised* standard.[81]

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[79] *Webster's Third New International Dictionary of the English Language* 1929 (1993).

[80] As the legislative history explains, this language means that standards must be set at "the maximum permissible ambient air level" that will protect sensitive subgroups in the population. S. Rep. No. 91-1196, at 10 (1970), *reprinted in* 1 *1970 Legis. Hist., supra* note 7, at 410, OJA 3687; *see also* H.R. Rep. No. 95-294, at 127, *reprinted in* 4 *1977 Legis. Hist., supra* note 8, at 2594, OJA 3678; 123 Cong. Rec. 18460, *reprinted in* 3 *1977 Legis. Hist., supra* note 8, at 1030-31, OJA 3669-70 (NAAQS are the "minimum necessary and the minimum reasonably attainable" for achieving public health goals).

[81] *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) ("[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action...."); *see also NRDC v. EPA*, 902 F.2d 962, 969 (D.C. Cir. 1990) (NAAQS needed to avoid "an unacceptable risk" of premature mortality); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981) (Section 109 requires "a reasoned analysis and evidence of risk.").

As this Court has "frequently reiterated..., an agency must cogently explain why it has exercised its discretion in a given manner."[82] But, to use the ozone case as an example, where there is no "bright line" distinguishing alternative standards from a public health protection standpoint, *see supra* pp. 12-13, how can the alternative that imposes the greatest overall burdens on society be "requisite" to protect the public's health? How can a standard that imposes enormous costs on society and that cannot be achieved in many areas, *see supra* pp. 15-16, be "requisite" to protect the public's health as compared to a standard that imposes fewer burdens and is being successfully implemented to reduce the same "public health" risks? The Agency never answers these questions on the grounds that Congress told it not to – an illogical and implausible result under a statute whose purpose is to promote the public health and welfare *and* the productive capacity of the country's population. CAA § 101(b)(1).

Similarly, the statutory direction that the Administrator select a margin of safety that is "adequate" does not suggest that she ignore the broad impacts of her decision on society when exercising risk management judgment. To the contrary, as the *en banc* D.C. Circuit observed in addressing the similar language of CAA § 112, a finding that a level of

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[82] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (explaining that deference accorded under *Chevron* is based on "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that *the ambiguity would be resolved, first and foremost, by the agency,* and desired the agency... to possess whatever degree of discretion the ambiguity allows.")(emphasis added).

air quality is "safe" does not require that it be "risk free."[83] Furthermore, even a requirement to provide an "ample" margin of safety to protect public health does "*not* ... preclude consideration of any factor."[84]

The "adequa[cy]" of a margin of safety cannot be determined in the abstract. Like purchasing insurance to protect against the possibility that a risk will become a reality, how much margin is "adequate" will depend on a broad range of factors including the certainty, size and nature of the risk, and on the cost of providing that insurance (or "margin" of safety) to protect against that predicted risk.[85]

If insurance can be provided at little cost, it may be worth the price. If insurance is so costly that it would impoverish those to be protected, it should be rejected as doing "more harm than good."[86] Similarly, in the case of a non-threshold pollutant where some health risk is assumed at any level above "zero," what margin of safety is "adequate" can be informed only by striking the balance contemplated by the purposes section of the Act.

Congress in 1977 also adopted a "significant risk" standard as the threshold for regulation under the NAAQS

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[83] *NRDC v. EPA, ("Vinyl Chloride")*, 824 F.2d 1146, 1164 (D.C. Cir. 1987) (*en banc*) (*citing Industrial Union Dep't*, 448 U.S. at 642).

[84] *Vinyl Chloride*, 824 F.2d at 1155 (emphasis added).

[85] *Cf. id.* at 1165 (in setting National Emission Standards for Hazardous Air Pollutants, the Administrator "must ... decide what risks are acceptable in the world in which we live.") (*citing Industrial Union Dep't*, 448 U.S. at 642 ("There are many activities that we engage in every day ... that entail some risk of accident or material health impairment [that] few people would consider 'unsafe.'")).

[86] *See* Breyer, *supra* note 12, at 11; *see also Vinyl Chloride*, 824 F.2d at 1148.

program.[87] A number of commentators have explained that the significance of risk cannot be determined in isolation from the costs of eliminating that risk.[88]

In short, determining whether an existing NAAQS provides an "adequate" margin of safety, or whether a revised NAAQS is "requisite" to protect the "public health," are quintessential risk management judgments that require a balancing of all factors relevant to promoting the public's health. This authorizing language does not call on the Administrator *to ignore* the consequences of her decisions; rather, she can promote the public health only by considering those consequences and striking the balance contemplated by § 101(b) of the Act.

This conclusion finds additional support in the language of § 108 describing the information that must be available for NAAQS decisions. For example, § 108(a) provides that the criteria document that is considered in making NAAQS

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[87] *See* H.R. Rep. No. 95-294, at 3, 48-49 (1977), *reprinted in* 4 *1977 Legis. Hist., supra* note 8, at 2470, 2515-16, OJA 3675, 3676-77 (adopting the endangerment standard as "the standard of proof which the Administrator must meet *before* promulgating regulations controlling the emissions of any air pollutant ... under this act.") (emphasis added); *Ethyl Corp.*, 541 F.2d at 12, 16, 31-32 (The "will endanger" language has been interpreted to require a finding of "significant risk of harm to the public health.").

[88] Stephen Breyer & Richard Stewart, *Administrative Law & Reg. Policy* 350 (3d ed. 1992); *see also* K. Arrow, *et al.*, *Is There a Role for Benefit-Cost Analysis in Environmental, Health and Safety Regulation?*, 272 Science 221 (1996) (advocating the use of cost benefit analyses in regulatory decisions on environmental protection); R. Morgenstern, ed., *Economic Analyses at EPA*, ix-x (Resources for the Future, Washington, D.C. 1997) ("[T]hough it should never be the only factor on which to base a regulatory decision, economic analysis in its many forms should always be one of the factors.").

decisions is to address "*all* identifiable effects on public health or welfare expected from the presence of such pollutant in the ambient air, in varying quantities," as well as "variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects [of the pollutant] on public health or welfare."[89] A range of health risks might flow from the presence of a pollutant in the ambient air, including both direct effects associated with exposures to the pollutant (e.g., inhalation health risks) and indirect health effects associated with how programs for reducing the pollutant as it is present "in the ambient air" are affected by NAAQS revision.

In other words, a standard that cannot be achieved, or that will render pollutant reduction efforts more "difficult, counter-productive, or confusing," Brief of Respondent EPA, at 73 (D.C. Cir. No. 97-1441), as compared to available alternatives, has identifiable and adverse impacts on public health. "[A]ll identifiable effects" of the pollutant as influenced by such real world factors are appropriate topics for consideration in the criteria document and by EPA during the NAAQS rulemaking. Indeed, in a portion of its decision not challenged by EPA, the lower court rejected EPA's refusal to construe the "all identifiable effects" language to include the UVB radiation effects of ozone reduction. 175 F.3d at 1051-52, App. 43a-46a. Clearly, this language is not limited to inhalation-related effects, as EPA has construed it.

Section 108 also directs EPA to address in its criteria "all identifiable effects" on "public ... welfare," CAA § 108(a)(2), a term that includes "economic values." CAA § 302(h). EPA must also provide "simultaneously" with issuance of the criteria document information on the "cost ...

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[89] *See NRDC*, 902 F.2d at 973 (emphasis added) *(citing* CAA § 108(a)(2)).

energy requirements, emission reduction benefit, and environmental impact" of alternative control strategies. CAA § 108(b)(1). In view of this statutory language, EPA is required to have available to it for any NAAQS rulemaking all of the information it needs to exercise sound risk management judgment. That Congress directed EPA to develop this information under § 108 in time for consideration in NAAQS rulemakings does not mean that EPA must ignore it, but rather supports the conclusion that EPA should exercise its risk management judgment in light of this information and consistent with the statutory purposes of the Act.

In sum, Congress in §§ 108 and 109 did not tell EPA to exercise public health risk management judgment by ignoring the overall consequences of its action. Rather, Congress' broad delegation of risk management authority must be implemented by defining limiting standards that protect the "public health" while promoting the statutory purposes of the Act.

B. Section 109(d) Confirms The Need For Consideration of the Impacts on Society of Decisions on Whether to Revise NAAQS.

Once EPA has established a NAAQS for a pollutant, as it has for both pollutants in this case, Congress directed that EPA revise the standard periodically as "may be appropriate" in accordance with §§ 108 and 109(b). CAA § 109(d)(1). In the case of standard revision, there is by definition a standard in place that the Agency previously determined was "requisite to protect public health" with an "adequate margin of safety."

To establish that standard revision is "appropriate" in accordance with §§ 108 and 109(b), the Agency must explain

why a change in the status quo is "requisite" to protect "public health." In other words, the agency must explain why the existing standard is no longer "appropriate" in accordance with §§ 108 and 109(b) and the revised standard is.

This analysis by definition recognizes the need to evaluate a broad range of relevant factors. *See West v. Gibson*, 527 U.S. 212, 218 (1998) ("The meaning of the word 'appropriate' permits its scope to expand" as changes in the law, or in the world, would require). In other words, the "appropriate" language confirms the importance of the ordinary meaning of "public health" and the statutory purposes as a source of decisional criteria for the Agency's exercise of discretion regarding NAAQS revision.

Furthermore, as discussed above, the broad language of § 109(b) contemplates the exercise of risk management judgment, and the information requirements of § 108 ensure that the Administrator will have at her disposal all of the information required for reasoned "public health" risk management. In the context of standard revision, § 109(d) specifically directs the Administrator to make any "appropriate" revisions "in accordance with § 108" – a provision that requires (under § 108(b)) development of information on implementation impacts "simultaneously" with public health information.

Whether standard revision is "appropriate in accordance with" § 108 and § 109(b) therefore does not limit the factors relevant to the exercise of risk management judgment. Rather, it contemplates the balancing of a range of factors consistent with the purposes of the Act.

In exercising her standard revision authority, Congress also required the Administrator to obtain the advice of her science advisers on a number of factors, including areas where additional knowledge is needed to understand the

adequacy of existing and revised NAAQS, and on the "public health, welfare, social, economic, or energy effects which may result" from alternative implementation programs.[90] CAA § 109(d)(2)(C)(iv).

Some of this information goes to the evaluation of the direct health risks of alternative air quality levels and implementation approaches. Other information goes to the risk management judgment on whether standard revision is "requisite" to protect public health, on whether margins of safety under existing and revised standards are "adequate," and on whether existing standards should be revised at all in light of "areas in which additional knowledge is required to appraise the adequacy" of existing standards. CAA § 109(d)(2)(C)(i).

The Administrator does not dispute that certain of the information her science advisers must develop (e.g., information on the "adequacy" and "basis" of existing and revised standards) is relevant to her decision on standard revision. She has asserted, however, that other information that must be developed (e.g., impacts resulting from alternative attainment strategies) is irrelevant to revising the standard.

The statute on its face does *not* direct the Administrator to consider only *some* of these § 109(d) factors and not others in determining what approach to managing uncertain health risk is "appropriate" in accordance with the "adequate" margin of safety and the "requisite" to protect "public health" language of § 109(b). Indeed, it would be unreasonable to conclude

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[90] *See International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 648 (D.C. Cir. 1973) (heightened standard of explanation required to override science advisor's advice).

that Congress wanted EPA to have all of this information before it, but to consider only some of it.[91]

Congress, of course, commented in legislative history that the type of information identified in § 109(d) may be "of interest and assistance to the States and Congress."[92] Nevertheless, Congress directed CASAC *in the statute* "to advise the *Administrator* with respect to any harmful effects" of standard revision in the context of her consideration of standard revision. CAA § 109(d)(2)(C)(i) (emphasis added).

As this Court has recognized, an agency has a heightened burden to explain its decision to change an existing regulatory program.[93] In this case, where existing air quality standards were in place that EPA had previously determined were "requisite to protect the public health" with an "adequate margin of safety," CAA § 109(b)(1), the Agency cannot fulfill its obligation of reasoned decisionmaking by ignoring information that Congress told it to develop.

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[91] *Cf. id.* at 642 (where data are uncertain or ambiguous, EPA must consider the "nature and consequences of the risk of error" in making regulatory decisions).

[92] H.R. Rep. No. 95-294, at 183 (1977), *reprinted in* 4 *1977 Legis. Hist.*, *supra* note 8, at 2650, OJA 3680.

[93] *See MVMA*, 463 U.S. at 42 ("[A]n agency changing its course ... is obligated to supply a reasoned analysis for the change *beyond that* which may be required when an agency does not act in the first instance.") (emphasis added); *see also Public Lands Council v. Babbitt*, 120 S.Ct. 1815, 1828-29 (2000) (O'Connor, J., concurring) ("Under [*MVMA v. State Farm*], an agency that departs from its previous rules will be found to have acted arbitrarily and capriciously, if it fails 'to supply a reasoned analysis for the change ....'").

C. The Legislative History Confirms the Need For Balancing to Promote the Purposes of the Act.

The legislative history confirms the message of the statutory language that Congress intended the Agency to exercise sound public health risk management judgment in light of the purposes of the Act and the commonly understood meaning of "public health."

In enacting the NAAQS program in 1970, the Senate explained that the "primary" NAAQS were to set a "national health minimum" standard which would provide a "reasonable degree of protection." *See* S. Rep. No. 91-1196, at 10, *reprinted in* 1 *1970 Legis. Hist.*, *supra* note 7, at 410, OJA 3687. With this understanding, Congress left States the option to establish an ambient air quality standard "more stringent" than the "national health minimum." *Id.*

In 1977, when it amended the Act, Congress understood that the NAAQS did not incorporate a "no risk philosophy" and explained that NAAQS should reflect the principle that "public [health] policy ... [be] wise policy."[94] Further reflecting Congress' delegation of authority to EPA to manage (not eliminate) health risk to achieve the Act's "public" health objective, Congress established in 1977 an additional CAA program to prevent significant deterioration (PSD) of air quality in areas where air quality is better than the NAAQS.[95]

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[94] *See* H.R. Rep. No. 95-294, at 127, *reprinted in* 4 *1977 Legis. Hist.*, *supra* note 8, at 2594, OJA 3678; *Hearings on S. 251, S. 252 and S. 253 Before the Subcomm. on Environmental Pollution of the Sen. Comm. on Env't and Pub. Works*, 95th Cong., 1st Sess., at 6-7 (1977) (Chmn. Muskie); *see also id.* at 37.

[95] *See* CAA Title I, Part C, §§ 160-169.

In arguing for this "non-degradation" program, Senator Muskie, the Clean Air Act's chief sponsor, explained that

> "the national primary and secondary standards were set for dirty air areas as the minimum necessary and the minimum reasonably attainable in the dirty area areas.... Even at the national primary standard level, which is the health standard, there are health effects that are not protected against.... At any level between zero pollution and *the pollution permitted by national primary standards, there are health effects.*"[96]

This PSD program is intended to address "*any actual or potential* adverse effect," CAA § 160(1) (emphasis added), thereby addressing health risks not addressed by the "public health" standards established under § 109. In other words, Congress in 1977 recognized that not all predicted *health risks* are *public health* risks, and Congress therefore responded with a separate program to address those health and welfare risks at levels of air pollution lower than specified by the NAAQS. Given this statutory matrix, Congress could not have intended that EPA ignore all of the costs and practical impacts of the risk management judgments required in setting the public health-based NAAQS.

In 1990, Congress enacted extensive amendments to the Clean Air Act, but did not amend the NAAQS program in §§ 108 and 109. Thus, Congress left in place a program that delegates to EPA authority to exercise public health risk

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[96] *See* 123 Cong. Rec. 18460, *reprinted in* 3 *1977 Legis. Hist.*, *supra* note 8, at 1030 (emphasis added), OJA 3669.

management judgment in setting and revising NAAQS. Implicit in that delegation is the obligation for the Agency to "give clear indication that it has exercised the discretion with which Congress has empowered it."[97] Far from directing the Agency to ignore factors that are relevant to the exercise of reasoned risk management judgment, the legislative history of the 1970 Act and the 1977 Amendments to § 109 confirms that this discretion must be exercised in a manner that furthers the statutory purposes of the Act.

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As the Court has said, judges "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[98] In this case, there is nothing on the face of the Act that directs the Administrator, in exercising her judgment to determine whether a standard revision is appropriate, to ignore the broad impacts of her decision on society. To the contrary, the common understanding of "public health" regulation and the explicit statutory language in § 101(b)(1) of the Act requires the Agency to strike a balance considering all factors.

III. *LEAD INDUSTRIES*, WHICH THE LOWER COURT CITES AS THE BASIS FOR ITS DECISION, SHOULD BE OVERRULED.

Without parsing the language of the statute or even mentioning the purposes section of the Act, the lower court has simply relied on *Lead Industries*, and subsequent cases

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[97] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

[98] *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1301 (2000).

citing *Lead Industries*,[99] for the proposition that the Administrator is precluded from considering the broad impacts of her decision on society in exercising her public health risk management responsibilities. 175 F.3d at 1040-41, App. 19a-21a. According to the court, this is a simple matter of statutory construction that can be resolved under "step one" of *Chevron*. *See id.* at 1040 (explaining that *Lead Industries* was decided "in *Chevron* step one terms").

The *Lead Industries* case, however, was decided before *Chevron* and found clarity of congressional expression in § 109 where none exists. Indeed, as discussed above, a *Chevron* "step one" analysis of all of the relevant Clean Air Act provisions, including the purposes section of the Act, confirms that EPA has broad discretion to consider and to balance all relevant factors in making "public health" risk management decisions. Because *Lead Industries* as applied by the lower court is at odds with the statute, it should be overruled.

First, as discussed above, nothing on the face of the statute directs EPA in exercising risk management judgment to ignore the broad impacts of its decision on society. In fact, as the D.C. Circuit observed in *Lead Industries*, "[s]ection 109(b) does not specify precisely what Congress had in mind when it directed the Administrator to prescribe air quality standards that are 'requisite to protect the public health.'" 647 F.2d at 1152.

Where Congress has delegated in broad terms, it is for the agency to fill out the statutory provision "within the limits of [the congressional] delegation."[100] Reflecting this established principle, the D.C. Circuit has repeatedly held in

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[99] *American Petroleum Inst.*, 665 F.2d at 1148; *NRDC*, 902 F.2d at 973.

[100] *Chevron*, 467 U.S. at 865; *see also Smiley*, 517 U.S. at 740-41.

the wake of this Court's decision in *Chevron* that an agency is free to consider costs when not expressly precluded from doing so by statute.[101] Indeed, as discussed above, a determination that regulation is "requisite" to protect the "public health" with an "adequate" margin of safety in response to predicted and theoretical health risk cannot be made *without* considering the overall impacts of the decision on society, including the costs of that decision.

Second, while the *Lead Industries* court asserted that the structure of the Act and legislative history supported its broad statement that costs can play no role in the promulgation of air quality standards, just the opposite conclusion is more appropriate in cases where the Agency must exercise risk management judgment to address uncertain and predicted health risk. In this case, Congress explained that the NAAQS program does not contemplate "zero risk" regulation. Congress therefore called on EPA to exercise judgment as to what risk is acceptable, in setting standards that are "requisite" to protect the "public health" with an "adequate" margin of safety. That judgment cannot be exercised without an understanding of the overall consequences of the Agency's action.

Third, the *Lead Industries* court reasoned that the "technology-forcing" nature of the CAA supports the conclusion that Congress wanted EPA to ignore the costs and feasibility of control technologies in setting NAAQS. 647

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[101] *See, e.g., Michigan v. EPA*, No. 98-1497, 2000 WL 180650, at *12 (D.C. Cir. Mar. 3, 2000) ("[O]nly where there is a 'clear congressional intent to preclude consideration of costs' ... [do] we find agencies barred from considering costs."); *see also, e.g., Vinyl Chloride*, 824 F.2d at 1155; *George E. Warren Corp. v. EPA*, 159 F.3d 616, 622-23 (D.C. Cir. 1998); *Grand Canyon Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998).

F.2d at 1149. However, this has little relevance to the exercise of public health risk management judgment. In other words, NAAQS that are set to reflect sound risk management principles will still require industrial sources to install whatever controls it takes to achieve those NAAQS. Similarly, while the D.C. Circuit has pointed to congressional statements that sources would have to shut down if they could not meet the NAAQS as supporting its construction of § 109, *see Vinyl Chloride*, 824 F.2d at 1159, sources would still have to shut down if they could not meet a NAAQS that reflects the exercise of sound public health risk management judgment.

Finally, Congress did *not* re-enact § 109 of the Clean Air Act in 1990, nor did it amend § 109 to codify the lower court's interpretations of § 109. No changes were made to § 109 in 1990. As a result, isolated statements in the 1990 legislative history (which EPA has argued suggest acquiescence to the D.C. Circuit's earlier decisions[102]) should be treated with great skepticism. As this Court has commented, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[103] Indeed, where Congress has not been requested to act on a statutory provision, and has taken no action, there is no basis

[102] Brief for the Federal Cross-Respondents in Opposition, at 14-15 (Nos. 99-1426, 99-1431, 99-1442).

[103] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998); *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185-87 (1994) (rejecting application of the "acquiescence doctrine" where Congress had amended other statutory provisions within the Act).

for concluding that Congress as a legislative body had any intent on the matter.[104]

In sum, when EPA regulates pollutant concentrations that are below any known "adverse effects" threshold, there will always be ranges of theoretical and uncertain predictions of health risk. The Agency must examine this range and decide whether standard revision is "appropriate" and will promote the overall goals of the Act.

Congress' delegation to EPA of authority to choose a result that is "appropriate" *does not forbid* consideration of *any* factor relevant to managing public health risks in a way that promotes the purposes of the Act. Therefore, a judicial interpretation of § 109 that precludes consideration of societal costs and related factors must be rejected under any sound *Chevron* "step one" analysis It is now time to resolve the confusion that has been created by *Lead Industries* by overturning that decision as inconsistent with the Act and the principles enunciated by this Court in *Chevron*.

CONCLUSION

For the reasons stated above, the decision of the lower court that EPA is precluded from considering the broad impacts of its decision on society in exercising risk management judgment under § 109 should be reversed,

[104] *See Central Bank N.A.*, 511 U.S. at 185-87; *id.* at 186 (*citing* U.S. CONST. art. I, § 7, cl. 2). *See also Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statutes, no less than enforcement, must conform with Article I.").

and the standards should be vacated because they were not based on consideration of all relevant factors.

Respectfully submitted,

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No. 99-1426

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,
Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1546, 97-1548, 97-1551, 97-1552, 97-1553,
97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567,
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97-1582, 97-1585, 97-1586, 97-1587, 97-1588, 97-1592,
97-1594, 97-1596, 97-1597, 97-1598

No. 97-1441

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1502, 97-1505, 97-1508, 97-1509, 97-1510,
97-1512, 97-1513, 97-1514, 97-1518, 97-1519, 97-1526,
97-1531, 97-1539, 97-1566, 97-1568, 97-1570, 97-1572,
97-1575, 97-1584, 97-1589, 97-1591, 97-1595, 97-1619

[Decided May 14, 1999]
[Argued December 17, 1998]

On Petitions for Review of an Order of the Environmental Protection Agency

BEFORE: WILLIAMS, GINSBURG and TATEL, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.*

Separate opinion dissenting from Part I filed by *Circuit Judge* Tatel.

PER CURIAM:

Introduction

The Clean Air Act requires EPA to promulgate and periodically revise national ambient air quality standards ("NAAQS") for each air pollutant identified by the agency as meeting certain statutory criteria. See Clean Air Act §§ 108-09, 42 U.S.C. §§ 7408-09. For each pollutant, EPA sets a "primary standard"—a concentration level "requisite to protect the public health" with an "adequate margin of safety"—and a "secondary standard"—a level "requisite to protect the public welfare." *Id.* § 7409(b).

In July 1997 EPA issued final rules revising the primary and secondary NAAQS for particulate matter ("PM") and ozone. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) ("PM Final Rule"); National Ambient Air Quality Standards for Ozone,

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* Judge Williams wrote Parts I and III.B; Judge Ginsburg wrote Parts II, III.A, and IV.D; Judge Tatel wrote Parts IV.A-C.

62 Fed. Reg. 38,856 (1997) ("Ozone Final Rule"). Numerous petitions for review have been filed for each rule.

In Part I we find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power. See U.S. Const. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States."). We remand the cases for EPA to develop a construction of the act that satisfies this constitutional requirement.

In Part II we reject the following claims: that § 109(d) of the Act allows EPA to consider costs; that EPA should have considered the environmental damage likely to result from the NAAQS' financial impact on the Abandoned Mine Reclamation Fund; that the NAAQS revisions violated the National Environmental Policy Act ("NEPA"), Unfunded Mandates Reform Act ("UMRA"), and Regulatory Flexibility Act ("RFA").

In Part III we decide two ozone-specific statutory issues, holding that the 1990 revisions to the Clean Air Act limit EPA's ability to enforce new ozone NAAQS and that EPA cannot ignore the possible health benefits of ozone.

Finally, in Part IV we resolve various challenges to the PM NAAQS. We agree with petitioners that EPA's choice of PM_{10} as the indicator for coarse particulate matter was arbitrary and capricious; we reject petitioners' claims that EPA must treat $PM_{2.5}$ as a "new pollutant," that EPA must identify a biological mechanism explaining PM's harmful effects, and that the Clean Air Act requires secondary

NAAQS to be set at levels that eliminate all adverse visibility effects.

The remaining issues cannot be resolved until such time as EPA may develop a constitutional construction of the act (and, if appropriate, modify the disputed NAAQS in accordance with that construction).

I. *Delegation*

Certain "Small Business Petitioners" argue in each case that EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power. We agree. Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

EPA regards ozone definitely, and PM likely, as non-threshold pollutants, i.e., ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero. See Ozone Final Rule, 62 Fed. Reg. at 38,863/3 ("Nor does it seem possible, in the Administrator's judgment, to identify [an ozone concentration] level at which it can be concluded with confidence that no 'adverse' effects

are likely to occur."); National Ambient Air Quality Standards for Ozone and Particulate Matter, 61 Fed. Reg. 65,637, 65,651/3 (1996) (proposed rule) ("[T]he single most important factor influencing the uncertainty associated with the risk estimates is whether or not a threshold concentration exists below which PM-associated health risks are not likely to occur."). For convenience, we refer to both as non-threshold pollutants; the indeterminacy of PM's status does not affect EPA's analysis, or ours.

Thus the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero. Section 109(b)(1) says that EPA must set each standard at the level "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). These are also the criteria by which EPA must determine whether a revision to existing NAAQS is appropriate. See 42 U.S.C. § 7409(d)(1) (EPA shall "promulgate such new standards as may be appropriate in accordance with . . . [§ 7409(b)]"); see also *infra* Part II.A. For EPA to pick any non-zero level it must explain the degree of imperfection permitted. The factors that EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much.

We begin with the criteria EPA has announced for assessing health effects in setting the NAAQS for non-threshold pollutants.[1] They are "the nature and severity of the

[1] Technically, EPA describes the criteria as used only for setting the "adequate margin of safety." There might be thought to be a separate step in which EPA determines what standard would protect public health *without* any margin of safety, and that step might be governed by different

health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed." Ozone Final Rule, 62 Fed. Reg. at 38,883/2; EPA, "Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper," at II-2 (July 1996) ("PM Staff Paper") (listing same factors). Although these criteria, so stated, are a bit vague, they do focus the inquiry on pollution's effects on public health. And most of the vagueness in the abstract formulation melts away as EPA applies the criteria: EPA basically considers severity of effect, certainty of effect, and size of population affected. These criteria, long ago approved by the judiciary, see *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1161 (D.C. Cir. 1980) ("*Lead Industries*"), do not themselves speak to the issue of degree.

Read in light of these factors, EPA's explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm. Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety," the formula set out by § 109(b)(1).

criteria. But EPA did not use such a process, and it need not. See *NRDC v. EPA*, 902 F.2d 963, 973 (D.C. Cir. 1990). Thus, the criteria mentioned in the text govern the whole standard-setting process.

Consider EPA's defense of the 0.08 ppm level of the ozone NAAQS. EPA explains that its choice is superior to retaining the existing level, 0.09 ppm, because more people are exposed to more serious effects at 0.09 than at 0.08. See Ozone Final Rule, 62 Fed. Reg. at 38,868/1. In defending the decision not to go down to 0.07, EPA never contradicts the intuitive proposition, confirmed by data in its Staff Paper, that reducing the standard to that level would bring about comparable changes. See EPA, "Review of National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information: OAQPS Staff Paper," at 156 (June 1996) ("Ozone Staff Paper"). Instead, it gives three other reasons. The principal substantive one is based on the criteria just discussed:

> The most certain O_3-related effects, while judged to be adverse, are transient and reversible (particularly at O_3 exposures below 0.08 ppm), and the more serious effects with greater immediate and potential long-term impacts on health are less certain, both as to the percentage of individuals exposed to various concentrations who are likely to experience such effects and as to the long-term medical significance of these effects.

Ozone Final Rule, 62 Fed. Reg. at 38,868/2.

In other words, effects are less certain and less severe at lower levels of exposure. This seems to be nothing more than a statement that lower exposure levels are associated with lower risk to public health. The dissent argues that in setting the standard at 0.08, EPA relied on evidence that health effects occurring below that level are "transient and reversible," Dissent at 5, evidently assuming that those at higher levels are not. But the EPA language quoted above

does not make the categorical distinction the dissent says it does, and it is far from apparent that any health effects existing above the level are permanent or irreversible.

In addition to the assertion quoted above, EPA cited the consensus of the Clean Air Scientific Advisory Committee ("CASAC") that the standard should not be set below 0.08. That body gave no specific reasons for its recommendations, so the appeal to its authority, also made in defense of other standards in the PM Final Rule, see PM Final Rule, 62 Fed. Reg. at 38,677/2 (daily fine PM standard); *id.* at 38,678/3 (annual coarse PM standard); *id.* at 38,679/1 (daily coarse PM standard), adds no enlightenment. The dissent stresses the undisputed eminence of CASAC's members, Dissent at 4, but the question whether EPA acted pursuant to lawfully delegated authority is not a scientific one. Nothing in what CASAC says helps us discern an intelligible principle derived by EPA from the Clean Air Act.

Finally, EPA argued that a 0.07 standard would be "closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of O_3 precursors, and thus more likely to be inappropriately targeted in some areas on such sources." Ozone Final Rule, 62 Fed. Reg. at 38,868/3. But a 0.08 level, of course, is also *closer* to these peak levels than 0.09. The dissent notes that a single background observation fell between 0.07 and 0.08, and says that EPA's decision "ensured that if a region surpasses the ozone standard, it will do so because of controllable human activity, not uncontrollable natural levels of ozone." Dissent at 6. EPA's language, coupled with the data on background ozone levels, may add up to a backhanded way of saying that, given the national character of the NAAQS, it is

inappropriate to set a standard below a level that can be achieved throughout the country without action affirmatively *extracting* chemicals from nature. That may well be a sound reading of the statute, but EPA has not explicitly adopted it.

EPA frequently defends a decision not to set a standard at a lower level on the basis that there is greater uncertainty that health effects exist at lower levels than the level of the standard. See Ozone Final Rule, 62 Fed. Reg. at 38,868/2; PM Final Rule, 62 Fed. Reg. at 38,676/3 (annual fine PM standard); *id.* at 38,677/2 (daily fine PM standard). And such an argument is likely implicit in its defense of the coarse PM standards. See PM Final Rule, 62 Fed. Reg. at 38,678/3-79/1. The dissent's defense of the fine particulate matter standard cites exactly such a justification. See Dissent at 6 ("The Agency explained that 'there is generally *greatest statistical confidence* in observed associations . . . for levels at and above the mean concentration [in certain studies]'") (emphasis added in dissent). But the increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much. None does.

The arguments EPA offers here show only that EPA is applying the stated factors and that larger public health harms (including increased probability of such harms) are, as expected, associated with higher pollutant concentrations. The principle EPA invokes for each increment in stringency (such as for adopting the annual coarse particulate matter standard that it chose here)—that it is "possible, but not certain" that health effects exist at that level, see PM Final Rule, 62 Fed. Reg. at 38,678/3[2]—could as easily, for any

[2] EPA did cite qualitative evidence for further support for its annual standard, and argued that the evidence "does not provide evidence of

non-threshold pollutant, justify a standard of zero. The same indeterminacy prevails in EPA's decisions *not* to pick a still more stringent level. For example, EPA's reasons for not lowering the ozone standard from 0.08 to 0.07 ppm—that "the more serious effects . . . are less certain" at the lower levels and that the lower levels are "closer to peak background levels," see Ozone Final Rule, 62 Fed. Reg. at 38,868/2—could also be employed to justify a refusal to reduce levels below those associated with London's "Killer Fog" of 1952. In that calamity, very high PM levels (up to 2,500 $\mu g/m^3$) are believed to have led to 4,000 excess deaths in a week.[3] Thus, the agency rightly recognizes that the question is one of degree, but offers no intelligible principle by which to identify a stopping point.

The latitude EPA claims here seems even broader than that OSHA asserted in *International Union, UAW v. OSHA* ("*Lockout/Tagout I*"), 938 F.2d 1310, 1317 (D.C. Cir. 1991), which was to set a standard that would reduce a substantial risk and that was not infeasible. In that case, OSHA thought itself free either to "do nothing at all" or to "require precautions that take the industry to the brink of ruin," with "all positions in between . . . evidently equally valid." *Id.* Here, EPA's freedom of movement between the poles is equally unconstrained, but the poles are even farther apart—

effects below the range of 40-50 $\mu g/m^3$," the standard level. PM Final Rule, 62 Fed. Reg. at 38,678/3. The referenced document, however, bears no indication that the qualitative evidence demonstrates effects *at* the level of the standard, either. See EPA, "Air Quality Criteria for Particulate Matter," at 13-79 (April 1996).

[3] See W.P.D. Logan, "Mortality in the London Fog Incident, 1952," The Lancet, Feb. 4, 1953, at 336-38.

the maximum stringency would send industry not just to the brink of ruin but hurtling over it, while the minimum stringency may be close to doing nothing at all.

In *Lockout/Tagout I* certain special conditions that have justified an exceptionally relaxed application of the nondelegation doctrine were absent, *id.* at 1317-18, and they are equally absent here. The standards in question affect the whole economy, requiring a "more precise" delegation than would otherwise be the case, see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935). No "special theories" justifying vague delegation such as the war powers of the President or the sovereign attributes of the delegatee have been or could be asserted. Nor is there some inherent characteristic of the field that bars development of a far more determinate basis for decision. (This is not to deny that there are difficulties; we consider some below.)

EPA cites prior decisions of this Court holding that when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the "policy judgment" to set the standards at one point within the relevant range rather than another. *NRDC v. EPA*, 902 F.2d 962, 969 (D.C. Cir. 1990); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Industries*, 647 F.2d at 1161 (D.C. Cir. 1980). We agree. But none of those panels addressed the claim of undue delegation that we face here, and accordingly had no occasion to ask EPA for coherence (for a "principle," to use the classic term) in making its "policy judgment." The latter phrase is not, after all, a self-sufficient justification for every refusal to define limits.

It was suggested at oral argument that EPA's vision of its discretion in application of § 109(b)(1) is no broader than that asserted by OSHA after a remand by this court and *upheld* by this court in *International Union, UAW v. OSHA* ("*Lockout/Tagout II*"), 37 F.3d 665 (D.C. Cir. 1994). But there, in fact, OSHA allowed itself to set only standards falling somewhere between maximum feasible stringency and some "moderate" departure from that level. *Id.* at 669. As our prior discussion should have indicated, here EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog.

The dissent argues that a nondelegation challenge similar to this one was rejected in *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), and cites that case's language that "the rationality of the means can be tested against goals capable of fairly precise definition in the language of science," *id.* at 677. See Dissent at 2. But the action challenged in *South Terminal* was EPA's adoption of a plan for ending or preventing violations in Boston of already-established NAAQS, not its promulgation of the NAAQS themselves. Thus, it seems likely that the "means" were the plan's provisions—e.g., a prohibition on most new parking in the city, see 504 F.2d at 671, and the "fairly precise[ly] defin[ed]" goals were the NAAQS themselves.

Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own. *Lockout/Tagout I*,

938 F.2d at 1313. Doing so serves at least two of three basic rationales for the nondelegation doctrine. If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily. See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758-59 (D.D.C. 1971) (Leventhal, J., for three-judge panel). And such standards enhance the likelihood that meaningful judicial review will prove feasible. See *id.* at 759. A remand of this sort of course does not serve the third key function of non-delegation doctrine, to "ensure[ ] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will," *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) ("*Benzene*") (Rehnquist, J., concurring). The agency will make the fundamental policy choices. But the remand does ensure that the courts not hold unconstitutional a statute that an agency, with the application of its special expertise, could salvage. In any event, we do not read current Supreme Court cases as applying the strong form of the nondelegation doctrine voiced in Justice Rehnquist's concurrence. See *Mistretta v. United States*, 488 U.S. 361, 377-79 (1989).

What sorts of "intelligible principles" might EPA adopt? Cost-benefit analysis, mentioned as a possibility in *Lockout/Tagout I*, 938 F.2d at 1319-21, is not available under decisions of this court. Our cases read § 109(b)(1) as barring EPA from considering any factor other than "health effects relating to pollutants in the air." *NRDC*, 902 F.2d at 973; see also *Lead Industries*, 647 F.2d at 1148; *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *American Petroleum Inst.*, 665 F.2d at 1185 (echoing the same themes).

In theory, EPA could make its criterion the eradication of any hint of direct health risk. This approach is certainly determinate enough, but it appears that it would require the agency to set the permissible levels of both pollutants here at zero. No party here appears to advocate this solution, and EPA appears to show no inclination to adopt it.[4]

EPA's past behavior suggests some readiness to adopt standards that leave non-zero residual risk. For example, it has employed commonly used clinical criteria to determine what qualifies as an adverse health effect. See Ozone Staff Paper at 59-60 (using American Thoracic Society standards to determine threshold for "adverse health effect" from ozone). On the issue of likelihood, for some purposes it might be appropriate to use standards drawn from other areas of the law, such as the familiar "more probable than not" criterion.

Of course a one-size-fits-all criterion of probability would make little sense. There is no reason why the same

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[4] A zero-risk policy might seem to imply de-industrialization, but in fact even that seems inadequate to the task (and even if the calculus is confined to direct risks from pollutants, as opposed to risks from the concomitant poverty). First, PM (at least) results from almost all combustion, so only total prohibition of fire or universal application of some heretofore unknown control technology would reduce manmade emissions to zero. See PM Staff Paper at IV-1. Second, the combustion associated with pastoral life appears to be rather deadly. See World Bank, *World Development Report 1992: Development and the Environment* 52 (1992) (noting that "biomass" fuels (i.e., wood, straw, or dung) are often the only fuels that "poor households, mostly in rural areas" can obtain or afford, and that indoor smoke from biomass burning "contributes to acute respiratory infections that cause an estimated 4 million deaths annually among infants and children.").

probability should govern assessments of a risk of thousands of deaths as against risks of a handful of people suffering momentary shortness of breath. More generally, all the relevant variables seem to range continuously from high to low: the possible effects of pollutants vary from death to trivialities, and the size of the affected population, the probability of an effect, and the associated uncertainty range from "large" numbers of persons with point estimates of high probability, to small numbers and vague ranges of probability. This does not seem insurmountable. Everyday life compels us all to make decisions balancing remote but severe harms against a probability distribution of benefits; people decide whether to proceed with an operation that carries a 1/1000 possibility of death, and (simplifying) a 90% chance of cure and a 10% chance of no effect, and a certainty of some short-term pain and nuisance. To be sure, all that requires is a go/no-go decision, while a serious effort at coherence under § 109(b)(1) would need to be more comprehensive. For example, a range of ailments short of death might need to be assigned weights. Nonetheless, an agency wielding the power over American life possessed by EPA should be capable of developing the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability. Possible building blocks for such a principled structure might be found in the approach Oregon used in devising its health plan for the poor. In determining what conditions would be eligible for treatment under its version of Medicaid, Oregon ranked treatments by the amount of improvement in "Quality-Adjusted Life Years" provided by each treatment, divided by the cost of the treatment.[5] Here, of course, EPA may not consider cost, and

[5] The "quality" of various health states was determined by poll, and

medical professionals determined the probabilities and durations of various health states with and without the treatment in question.

Oregon was twice forced to revise its system because the United States Department of Health & Human Services determined that the original proposal and a revision violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The reason given for this determination was that both versions undervalued the lives of persons with disabilities: The original plan measured quality of life according to the attitudes of the general population rather than the attitudes of persons with disabilities. See HHS, "Analysis Under the Americans with Disabilities Act ('ADA') of the Oregon Reform Demonstration" (Aug. 3, 1992), reprinted in 9 Issues in L. & Med. 397, 410, 410 (1994). The revised plan ranked treatments leaving the patient in a "symptomatic" state lower than those leaving the patient asymptomatic, and certain disabling conditions were considered "symptoms." See Letter from Timothy B. Flanagan, Assistant Attorney General, to Susan K. Zagame, Acting General Counsel, HHS (Jan. 19, 1993), reprinted in 9 Issues in L. & Med. 397, 418, 421 (1994). The Department's determination was extensively criticized when issued. See Maxwell J. Mehlman et al., "When Do Health Care Decisions Discriminate Against Persons with Disabilities?" 22 J. Of Health Politics, Policy & L. 1385, 1390 (1997) (HHS's "decision provoked a storm of disbelief and denunciation").

We take no position on whether HHS's view was correct, or if the underlying norm also governs EPA's decisions under § 109(b)(1). An affirmative answer, however, would not seem to preclude use of some of Oregon's approach. The first step would be giving appropriate weight to the views of persons with disabilities. The second might be measuring the seriousness of a pollution-induced health effect by the *absolute* level of well-being that the effect brings about, not by the *decrease* in level that the effect causes. In other words, if the maximum well-being level is 100 and the average asthmatic whose asthma constitutes a disability has a well-being of 80 in the absence of air pollution (according to a measure that appropriately considers asthmatics' own assessments of their condition), then a response to air pollution that reduces the asthmatics' well-being to 70 could be counted as an effect of magnitude 30 (the difference from full health), rather than 10 (the difference from the level without the pollution). That approach would ensure that effects on

indeed may well find a completely different method for securing reasonable coherence. Alternatively, if EPA concludes that there is no principle available, it can so report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice.

We have discussed only the primary standards. Because the secondary standards are at least in part based on those, see Ozone Final Rule, 62 Fed. Reg. at 38,875/3-76/1; PM Final Rule, 62 Fed. Reg. at 38,680/3, we also remand the cases to the agency with regard to the secondary standards as well, for further consideration in light of this opinion.

II. *Other General Claims*

The petitioners and amici contend that the EPA erroneously failed to consider a host of factors in revising the PM and ozone NAAQS. We reject each of these claims in turn.

A. Consideration of Cost in Revising Standards

As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards. See *Lead Industries*, 647 F.2d at 1148 (D.C. Cir. 1980); see also *NRDC*, 902 F.2d at 973 (following *Lead Industries* in reviewing particulate matter NAAQS); *American Petroleum Inst.*, 665 F.2d at 1185 (same, in reviewing ozone NAAQS). The petitioners make four unsuccessful attempts to distinguish *Lead Industries* and its progeny.

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persons with disabilities were not underestimated, even in the broad sense of that term apparently adopted by HHS.

First, the petitioners claim that in *Lead Industries* we held only that the Clean Air Act does not compel the EPA to consider the costs of implementation in setting a NAAQS; on the contrary, we held that the Act precludes the EPA from doing so. See *Lead Industries*, 647 F.2d at 1148 ("the statute and its legislative history make clear that economic considerations play no part in the promulgation of [NAAQS]").

Second, that we decided *Lead Industries* prior to the Supreme Court's decision in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) does not, as the petitioners suggest, require us to revisit the earlier case. The *Lead Industries* decision was made in *Chevron* step one terms, see *id.*, as the post-*Chevron* progeny of *Lead Industries* have made clear. See *NRDC*, 902 F.2d at 973 ("Consideration of costs . . . would be flatly inconsistent with the statute, legislative history and case law on this point"); *NRDC v. EPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (in banc) ("*Vinyl Chloride*") ("[S]tatute on its face does not allow consideration of technological or economic feasibility. . . . Congress considered the alternatives and chose to close down sources or even industries rather than to allow risks to health").

Third, though the petitioners are correct that in *Lead Industries* we interpreted § 109(b), which governs the setting of NAAQS, and not § 109(d), which governs the revising of NAAQS, we can discern no legally relevant difference in the two sections that would make *Lead Industries* inapplicable to § 109(d). Section 109(d)(1) directs the EPA to:

> complete a thorough review of the criteria published under section 7408 of this title and the [NAAQS] promulgated under this section and [to] make such

> revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section.

42 U.S.C. § 7409(d)(1). The petitioners contend that consideration of costs is one pertinent factor in determining whether revision of a NAAQS is "appropriate," but this argument ignores the clause immediately following "appropriate," which incorporates § 109(b) and thereby affirmatively precludes consideration of costs in revising NAAQS. Section 108(b), 42 U.S.C. § 7408(b), does require the EPA to provide the States with information on the cost of implementing NAAQS, but the reference to § 108 does not permit consideration of costs in setting NAAQS because it clearly relates back to the requirement that the EPA "make. . . revisions in ["the criteria published under section 7408"] . . . as may be appropriate." And insofar as the air quality criteria do apply to the setting of NAAQS, they do so through § 109(b), which (again) precludes the consideration of costs and which is explicitly incorporated into § 109(d)(1). See *id.* § 7409(b)(1) (primary NAAQS to be "based on [the air quality] criteria" issued under § 108).

Fourth, the petitioners point to § 109(d)(2), which creates the CASAC and requires it to advise the EPA about, among other things, "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such [NAAQS]." *Id.* § 7409(d)(2)(C)(iv). Why, ask the petitioners, would the CASAC be required to advise the EPA about these matters if the EPA were not then supposed to consider its advice in the course of revising the NAAQS? As

above, however, the petitioners overlook that § 109(d)(1) directs the EPA to review and to revise, as appropriate, the air quality standards issued under § 108 as well as the NAAQS promulgated under § 109(b). The advice required in § 109(d)(2)(C)(iv) is pertinent only to the EPA's duty under § 108 to provide the States with control strategy information.

B. Environmental Consequences of Implementing NAAQS

The State Petitioners argue that the EPA erred in failing "to consider the environmental consequences resulting from the financial impact of the [revised $PM_{2.5}$ and ozone NAAQS] on the federal Abandoned Mine Reclamation Fund Act." This argument is squarely foreclosed by our decision in *NRDC*. In reviewing the EPA's previous revision of the PM NAAQS, we rejected the argument that the EPA "erred in refusing to consider the health consequences of unemployment in determining the primary [NAAQS] for particulate matter" and held that "[i]t is only *health effects relating to pollutants in the air* that EPA may consider." 902 F.2d at 972-73 (emphasis in original). Unlike the positive health benefits of ozone that we hold (in Part III.B, below) the EPA must consider, any detrimental health effects resulting from the financial impact upon the mine fund, like the health consequences of unemployment, are traceable to the cost of complying with the revised $PM_{2.5}$ and ozone NAAQS and not to the presence of those pollutants in the air.

C. The National Environmental Policy Act

In challenging both the revised $PM_{2.5}$ and ozone NAAQS, the State Petitioners also argue that the EPA failed to comply with certain requirements of the NEPA. The petitioners

recognize that the Congress has exempted all actions under the Clean Air Act, including the setting of NAAQS, from the central requirement of the NEPA, namely, the preparation of an Environmental Impact Statement. Compare 42 U.S.C. § 4332(2)(C)-(D) (agency must prepare EIS in all "major Federal actions significantly affecting the quality of the human environment"), with 15 U.S.C. § 793(c)(1) ("No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the [NEPA]"). Nonetheless, they suggest that the EPA is required to complete the functional equivalent of an EIS and also to comply with other requirements in the NEPA, see 42 U.S.C. § 4332(2)(B), (E), (G). State Petitioners' PM Brief at 20; State Petitioners' Ozone Brief at 19. We reject each of these suggestions.

First, the State Petitioners contend that this court has "recognized that the '[CAA], properly construed, requires the functional equivalent of a NEPA impact statement,'" *id.* (quoting *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384 (1973)). Our decision in *Portland Cement*, however, actually construed only "section 111 of the Clean Air Act." By replacing these words with "[CAA]" in their briefs, the petitioners misrepresent our interpretation of a single section of the Clean Air Act, dealing with emission standards for stationary sources, as an interpretation of the entire Act. Even if the petitioners were correct, however, *Portland Cement* predated, and is now superseded by, the statutory exemption in 15 U.S.C. § 793(c)(1), which the Congress added in 1974.

Second, the State Petitioners contend that a provision of the NEPA "requires that EPA weigh 'economic considerations.'" The section to which the petitioners refer reads as follows: "all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(2)(B). Even if this section is properly read generally to require an agency to consider implementation costs, § 109(d)(1) specifically prohibits the EPA from doing so. And the NEPA provides that it shall not "in any way affect the specific statutory obligations of any Federal agency . . . to comply with criteria or standards of environmental quality." 42 U.S.C. § 4334(1). Therefore, § 4332(2)(B) cannot require the EPA to disregard the prohibition in § 109(d)(1) upon the consideration of costs in setting NAAQS.

The State Petitioners' remaining arguments—that the EPA failed to comply with two other sections of the NEPA—fare little better. Section 4332(2)(E) requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." As with § 4332(2)(B), insofar as § 4332(2)(E) can be read to require the EPA to consider the costs of implementing NAAQS when revising those standards, contrary to the prohibition in § 109(d)(1), § 4334(1) prevents it from having any effect.

If, on the other hand, § 4332(2)(E) is understood in the context of the Clean Air Act to require the EPA merely to

discuss implementation alternatives, then it, like the similar § 4332(2)(G) with which the petitioners also claim the EPA failed to comply, is the functional equivalent of § 108(b)(1). That section requires the EPA to provide the States with, among other things, "such data as are available on available technology and alternative methods of prevention and control of air pollution." As we recognize with regard to the requirement that the agency prepare an EIS, "[c]ompliance with NEPA's . . . requirement[s] has not been considered necessary when the agency's organic legislation mandates procedures for considering the environment that are 'functional equivalents' of the [NEPA's] process." *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 367 n.51 (1981). The rationale for the functional equivalence doctrine is the well-established principle that a "general statutory rule usually does not govern unless there is no more specific rule." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989); see also *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 504-05 (11th Cir. 1990) (citing cases). The NEPA is the general statute requiring agencies to consider environmental harms, whereas the Clean Air Act is the more specific and its equivalent provisions apply in place of those in the NEPA. See *Portland Cement*, 486 F.2d at 386 (finding functional equivalence when more specific statute strikes "workable balance between some of the advantages and disadvantages of full application of NEPA").

Our analysis of the petitioners' contentions leads us to conclude that nothing in the NEPA requires the EPA in setting NAAQS to consider or to discuss matters that the Clean Air Act does not already permit or require.

D. The Unfunded Mandates Reform Act

The State Petitioners in the particulate matter case and Congressman Bliley in the ozone case both contend that the EPA is required by the Unfunded Mandates Reform Act, 2 U.S.C. § 1501 *et seq.*, to prepare a Regulatory Impact Statement (RIS) when setting a NAAQS, see *id.* § 1532, and to choose the least burdensome from a range of alternative permissible NAAQS, see *id.* § 1535. Even if the petitioners and the amicus are correct regarding the interaction of the UMRA and the CAA—a point the EPA strongly contests—we can provide them with no relief. See *id.* § 1571(a)(3) ("[T]he inadequacy or failure to prepare [a RIS] . . . shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting [an] agency rule"); *id.* § 1571(b) ("Except as provided in [§ 1571(a), which does not mention § 1535,]. . . any compliance or noncompliance with the provisions of this chapter . . . shall not be subject to judicial review; and no provision of this chapter shall be construed to [be] . . . enforceable by any person in any . . . judicial action").

The State Petitioners, recognizing the limitations upon judicial review in § 1571, contend that the EPA's failure to prepare a RIS can nonetheless render the NAAQS arbitrary and capricious, see 42 U.S.C. § 7607(d)(9), relying upon *Thompson v. Clark*, 741 F.2d 401 (D.C. Cir. 1984). In that case, we interpreted a statute that, like the UMRA, both specified that the RIS be included in the record for judicial review and precluded judicial review of an agency's compliance with the RIS requirement. We held that a "reviewing court will consider the contents of the [RIS], along with the rest of the record, in assessing not the agency's compliance with the [requirement to prepare the

RIS], but the validity of the rule under other provisions of law." *Id.* at 405. No information in a RIS, however, could lead us to conclude that the EPA improperly set the PM and ozone NAAQS; the only information such a statement would add to the rulemaking record for a NAAQS would pertain to the costs of implementation, see 2 U.S.C. § 1532(a), and the EPA is precluded from considering those costs in setting a NAAQS. Accordingly, the failure to prepare a RIS does not render the NAAQS arbitrary and capricious.

E. The Regulatory Flexibility Act

In both the ozone and particulate matter cases, the Small Business Petitioners argue that the EPA improperly certified that the revised NAAQS would not have a significant impact upon a substantial number of small entities. The Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, as amended in 1996 by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, tit. II, 110 Stat. 857-74 ("SBREFA"), requires an agency, when engaging in notice and comment rulemaking, to "prepare and make available for public comment an initial regulatory flexibility analysis. . . . [that] describe[s] the impact of the proposed rule on small entities," 5 U.S.C. § 603(a), including small businesses, small organizations, and small governmental jurisdictions, see *id.* § 601(6). When promulgating a final rule, an agency must describe "the steps . . . taken to minimize the significant economic impact on small entities." *Id.* § 604(a)(5). According to the petitioners, if the EPA had complied with the RFA, it would likely have promulgated less stringent PM and ozone NAAQS than those actually chosen, which would have reduced the burden upon small entities.

A regulatory flexibility analysis is not required, however, if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *Id.* § 605(b). Further, the SBREFA made no change in the requirement that a regulatory flexibility analysis conducted pursuant to the RFA include estimates of "the number of small entities to which the proposed rule will apply" and of "the classes of small entities which will be subject to the requirement." 5 U.S.C. § 603(b)(3)-(4). We have consistently interpreted the RFA, based upon these sections, to impose no obligation upon an agency "to conduct a small entity impact analysis of effects on entities which it does not regulate." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 & n.18 (1998).

The EPA certified that its revised NAAQS will "not have a significant economic impact on small entities within the meaning of the RFA." PM Final Rule, 62 Fed. Reg. at 38,702/2; Ozone Final Rule, 62 Fed. Reg. at 38,887/2-3. According to the EPA, the NAAQS themselves impose no regulations upon small entities. Instead, the several States regulate small entities through the state implementation plans (SIPs) that they are required by the Clean Air Act to develop. See 42 U.S.C. § 7410. Because the NAAQS therefore regulate small entities only indirectly—that is, insofar as they affect the planning decisions of the States—the EPA concluded that small entities are not "subject to the proposed regulation." See *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985); see also *id.* at 343 ("Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.").

The EPA's description of the relationship between NAAQS, SIPs, and small entities strikes us as incontestable. The States have broad discretion in determining the manner in which they will achieve compliance with the NAAQS. The EPA "is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards" and cannot reject a SIP based upon its view of "the wisdom of a State's choices of emission limitations," *Train v. NRDC*, 421 U.S. 60, 79 (1975) (emphasis in original), or of the technological infeasibility of the plan. See *Union Elec. Co. v. EPA*, 427 U.S. 246, 265 (1976). Therefore, a State may, if it chooses, avoid imposing upon small entities any of the burdens of complying with a revised NAAQS. Only if a State does not submit a SIP that complies with § 110, 42 U.S.C. § 7410, must the EPA adopt an implementation plan of its own, which would require the EPA to decide what burdens small entities should bear. The agency has stated, however, that it will do a regulatory flexibility analysis before adopting an implementation plan of its own, as it did in 1994 when proposing such a plan for Los Angeles. See Ozone Final Rule, 62 Fed. Reg. at 38,891/1; PM Final Rule, 62 Fed. Reg. at 38,705/3.

The responses of the Small Business Petitioners do not persuade us to reject the EPA's argument or to deviate from our holdings in *Mid-Tex* and its progeny. First, the Small Business Petitioners contend that we must defer to the Small Business Administration's interpretation of the Act, as expressed in a letter to the EPA from the SBA's Chief Counsel for Advocacy, that the NAAQS do impose requirements upon small entities. The SBA, however, neither administers nor has any policymaking role under the RFA; at most its role is advisory. See, e.g., 5 U.S.C. §§ 601(3),

602(b), 603(a), 605(b), 609(b)(1), 612. Therefore, we do not defer to the SBA's interpretation of the RFA. See *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (no *Chevron* deference owed to agency interpretation of statute it does not administer). Nor do we defer to the EPA's interpretation of the RFA, for it does not administer the Act either. We do, however, find the EPA's interpretation of the statute persuasive.

Second, the Small Business Petitioners argue that the EPA cannot claim both that the NAAQS will have no effect upon small entities and that it will have positive health effects. Clearly, however, the EPA can maintain that the NAAQS will have health effects because the Clean Air Act empowers the agency to ensure that such benefits accrue; and it can maintain that the NAAQS will not directly affect small entities because it has no authority (short of imposing its own implementation plan upon a non-complying state) to impose any burdens upon such entities.

Third, the Small Business Petitioners attempt to distinguish the possible effects upon small entities in this case from the indirect effects that, as we found in *Mid-Tex*, are not within the contemplation of the RFA. But *Mid-Tex* is not so easily distinguished. The petitioners in that case argued that the RFA required the FERC to consider economic effects not only upon regulated industries but also upon the small entities that are their wholesale customers, even though the customers were not directly regulated by the FERC. We rejected that argument, finding a "clear indication" in the language of § 603 that the RFA is "limited to small entities subject to the proposed regulation." *Mid-Tex*, 773 F.2d at

342; see also *Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 467 n.18 ("The RFA itself distinguishes between small entities subject to an agency rule, to which its requirements apply, and those not subject to the rule, to which the requirements do not apply."); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (1996) (regulatory flexibility analysis provision applies only to "small entities *that are subject to the requirements of the rule*") (emphasis in original). That the Clean Air Act requires the States to submit SIPs that will achieve compliance with the NAAQS does not, in view of the States' nearly complete discretion to determine which entities will bear the burdens of a revised NAAQS, make such small entities as the SIPs may regulate any more subject to the EPA's regulation than were the wholesalers in *Mid-Tex* subject to regulation by the FERC.

Finally, the Small Business Petitioners suggest that the Congress in enacting the SBREFA overruled our prior interpretation of the RFA in *Mid-Tex* and its progeny. The SBREFA made a number of changes in the RFA, but it did not change anything in § 603 upon which we relied in *Mid-Tex*. And although the Congress made a slight modification in § 605(b), we do not understand it to alter our analysis in *Mid-Tex*. Prior to 1996, § 605(b) required an agency to provide "a succinct statement explaining the reasons" for its certification that the promulgated rule would not have a significant economic impact upon small entities. That section now requires "a statement providing the factual basis for such certification." Our decision in *Mid-Tex* contemplates that an agency may justify its certification under the RFA upon the "factual basis" that the rule does not directly regulate any small entities. Nothing in the change to § 605(b) suggests that basis for certification is no longer

permissible. (Indeed, the section of the statute amending § 605(b) is labeled "Technical and Conforming Amendments," see SBREFA § 243, 110 Stat. at 866.) We therefore conclude that the EPA properly certified that its NAAQS would not have a significant impact upon a substantial number of small entities.

III. *Ozone*

A. Subpart 2 and the Revised Ozone Standard

In 1990 the Congress substantially revised the Clean Air Act by, among other things, adding specific enforcement provisions for carbon monoxide, particulate matter, sulfur oxides, nitrogen dioxide, lead, and as pertinent here, ozone. Previously, the Act required that all areas of the country not attaining the primary ozone standard, no matter how far from attainment, come into compliance "as expeditiously as practicable but not later than December 31, 1987." 42 U.S.C. § 7502 (1988). Many areas had not attained the primary ozone NAAQS by that date; some were still a long way from doing so. The Congress responded to the continued ozone problem by enacting a new enforcement scheme, which it codified as Subpart 2 of Part D of the Clean Air Act, 42 U.S.C. §§ 7511-7511f, redesignating the original provisions as Subpart 1.

Subpart 2 requires the EPA to classify nonattainment areas based upon their design value, which is a rough measure of whether an area complies with the 0.12 ppm, 1-hour primary ozone standard.[6] A table in Subpart 2, set out

[6] More specifically, the design value is the fourth-highest daily maximum ozone concentration in an area over three consecutive years for

here in the margin,[7] establishes classifications ranging from marginal to extreme, and provides an attainment date for each

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which there are sufficient data. If that value is less than or equal to 0.12 ppm, then an area will have only three expected values above that level and it will be in attainment with the ozone NAAQS. See EPA, The Clean Air Act Ozone Design Value Study: Final Report 1-1 to 1-22 (1994) (filed pursuant to 42 U.S.C. § 7511b(g), which required the EPA to conduct "a study of whether the [existing design value] methodology . . . provides a reasonable indicator of the ozone air quality of ozone nonattainment areas"; the EPA concluded it did).

[7] This table appears in Clean Air Act § 181(a)(1), 42 U.S.C. § 7511(a)(1):

TABLE 1

Area Class	Design value [ppm]	Primary standard attainment date
Marginal.....	0.121 up to 0.138	3 years after November 15, 1990
Moderate.....	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

The Severe Area category is later subdivided, creating a sixth classification for ozone nonattainment areas. See *id.* § 7511(a)(2) ("Notwithstanding table 1, [for] a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years . . . after November 15, 1990").

class. See *id.* § 7511(a)(1)-(2). Subpart 2 also specifies, for each class of nonattainment areas, both measures that the States must take to reduce emissions of the chemicals that are precursors of ozone and information that the States must report to the EPA. See *id.* § 7511a. In short, Subpart 2 is the Congress's comprehensive plan for reducing ozone levels throughout the country.

The State and Non-State Petitioners, along with Congressman Bliley appearing as an amicus curiae, argue that Subpart 2 precludes the EPA from revising the primary and secondary ozone NAAQS. We reject this argument (in Part III.A.1) insofar as it pertains to the EPA's continued ability to promulgate a revised ozone NAAQS or to designate areas as not in attainment with a revised NAAQS. We agree (in Part III.A.2) with those petitioners, however, insofar as they maintain, based upon the text and structure of Subparts 1 and 2, that the EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2. Further, we conclude (in Part III.A.3) that the EPA may not require a State to comply with a revised secondary ozone NAAQS in any area that has yet to attain the 0.12 ppm primary standard.

1. The EPA's Power to Revise the Ozone NAAQS and Designate Areas as Nonattainment

The 1990 amendments did not alter the section of the Clean Air Act that provides for setting and revising primary and secondary NAAQS. See 42 U.S.C. § 7409. The Administrator, therefore, still must "at five-year intervals [from December 31, 1980] . . . complete a thorough review of . . . the [NAAQS] promulgated under this section and . . .

make such revisions in such . . . standards . . . as may be appropriate." *Id.* § 7409(d)(1). The Second Circuit held that this section continues to "set[ ] forth a bright-line rule for agency action," *American Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (1992), and we agree. Nothing in the Act modifies this "bright-line rule" or otherwise makes it inapplicable to revision of the ozone NAAQS.

To the extent that the 1990 amendments shed any light upon this question, they suggest that the EPA retains its authority to revise the ozone NAAQS. For example, if the EPA relaxes a NAAQS after enactment of the 1990 amendments, then "the Administrator shall . . . promulgate requirements applicable to all areas which have not attained that [relaxed] standard as of the date of such relaxation. . . . [which] shall provide for controls . . . not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). Although two other subsections of § 172 are expressly made inapplicable to the ozone regulations in Subpart 2, see *id.* § 7502(a)(1)(C), (a)(2)(D), this so-called anti-backsliding provision contains no such exemption. Accordingly, as the EPA notes, this section specifically contemplates that the agency may relax its ozone NAAQS and, therefore, necessarily implies that it retains the authority to revise that NAAQS. Tellingly, neither the petitioners nor the amicus reply to this point.

The petitioners and amicus raise two other arguments to support their position that the EPA cannot alter the ozone NAAQS without the approval of the Congress. We reject both in short order.

First, the Non-State Petitioners contend that Subpart 2 renders revision of the ozone NAAQS "inappropriate" within

the meaning of § 109(d)(1), which provides the EPA shall "make such revisions in such . . . standards . . . as may be appropriate." 42 U.S.C. § 7409(d)(1). This argument, however, pointedly ignores the text immediately following the word "appropriate," which specifies that appropriateness is to be determined "in accordance with section 7408 . . . and [§ 7409(b)]" (and which, as we read it, means exclusively in accord with those sections). See, e.g., *American Methyl Corp. v. EPA*, 749 F.2d 826, 835-36 (D.C. Cir. 1984). Because Subpart 2 is neither listed in § 109(d)(1) nor incorporated by reference in either § 108, *id.* § 7408, or § 109(b), it cannot render revision of the ozone NAAQS inappropriate.

Second, the State Petitioners and Congressman Bliley argue, based upon the classification table in § 181(a)(1), *id.* § 7511(a)(1), that Subpart 2 codified the 0.12 ppm ozone NAAQS and, therefore, only the Congress can promulgate a revised NAAQS. Yet not all areas designated nonattainment for ozone will have design values of 0.121 ppm or higher. In fact, this was true of areas designated nonattainment for ozone as a result of the 1990 amendments, see Ozone Final Rule, 62 Fed. Reg. at 38,884/3, at least in part because of the stringent criteria in the Clean Air Act for changing the designation of an area to attainment from nonattainment. See 42 U.S.C. § 7407(d)(3)(E)(iii) (redesignation permissible only if area's attainment of NAAQS "is due to permanent and enforceable reductions in emissions"). In short, although the numbers in the classification table are based upon the 0.12 ppm ozone NAAQS, they are neither equivalent to nor a codification of the NAAQS.

Not only does the EPA, as we conclude above, retain authority to promulgate a revised ozone NAAQS; the agency is still required, "in no case later than 2 years from the date of promulgation" of a revised NAAQS, to designate areas as attainment, nonattainment, or unclassifiable under that NAAQS. *Id.* § 7407(d)(1)(B). Although the 1990 amendments extended by roughly 18 months the maximum time between promulgation of a revised NAAQS and designation of nonattainment areas under that NAAQS, see 42 U.S.C. § 7407(d)(1)-(2) (1988), they made no substantive change in the EPA's authority to designate areas as nonattainment under a revised NAAQS. Therefore, we hold that the EPA retains the power to designate areas as nonattainment under a revised ozone NAAQS.

2. The EPA's Power to Enforce the Revised Ozone Standard

That the enactment of Subpart 2 does not alter the EPA's authority to revise the ozone NAAQS or to designate areas as nonattainment for ozone does not, however, compel the conclusion that Subpart 2 has no effect upon the EPA's authority to enforce a revised primary ozone NAAQS. (We consider the enforcement of secondary ozone NAAQS in Part III.A.3, below.) In fact, the text and structure of Subparts 1 and 2 suggest precisely the opposite conclusion. After designating an area as nonattainment under a NAAQS, the EPA normally looks to Subpart 1 for authority to "classify the area for the purpose of applying an attainment date." 42 U.S.C. § 7502(a)(1)-(2). The cited provisions, however, do not apply "with respect to nonattainment areas for which classifications [and attainment dates] are specifically

provided under other provisions of [Part D of Subchapter 1 of the Clean Air Act]." *Id.* § 7502(a)(1)(C), (a)(2)(D).

The EPA argues that Subpart 2 specifically provides classifications and attainment dates only for nonattainment designations under the 0.12 ppm ozone NAAQS. The State and Non-State Petitioners counter that Subpart 2 specifically provides classifications and dates for all areas designated nonattainment under any ozone NAAQS. We agree with the petitioners.

The pertinent provision of Subpart 2 reads as follows:

> (a) **Classification and attainment dates for 1989 nonattainment areas.** — (1) Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area. . . .

Id. § 7511(a)(1). As the petitioners note, § 107(d), 42 U.S.C. § 7407(d), specifies three different times at which an area can be designated "nonattainment for ozone": immediately following enactment of the 1990 amendments, *id.* § 7407(d)(4); after the EPA revises the ozone NAAQS, *id.* § 7407(d)(1); and when an area that was in attainment, either when the Congress enacted the 1990 amendments or when the EPA promulgated a revised ozone NAAQS, later ceases to comply, *id.* § 7407(d)(3). The petitioners conclude from the general reference to § 107(d) that the classifications and attainment dates in Subpart 2 apply to areas designated under §§ 107(d)(1), (3), and (4). The EPA gamely responds that the reference to § 107(d) includes only subsection (4), but we do

not defer to the agency's interpretation because we find that the Congress has spoken on the "precise question at issue" and we "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). We canvass the two reasons that lead us to this conclusion before returning to the EPA's argument.

First, the reference to § 107(d) in § 181(a)(1) appears to have been purposeful and not the drafting error that the EPA's interpretation implies. The Congress considered but did not adopt bills that clearly would have limited the reach of Subpart 2 to nonattainment designations made immediately following enactment of the 1990 amendments. The Senate bill contained a version of Subpart 2 that classified only those areas designated nonattainment for ozone under its equivalent of § 107(d)(4). See S. 1630, 101st Cong. §§ 101, 107, reprinted in III Legislative History of the Clean Air Act Amendments of 1990, at 4124-25, 4195 [hereinafter 1990 Legislative History]. The version of Subpart 2 in the House bill, as originally introduced, similarly referred only to designations made under its equivalent of § 107(d)(4). See H.R. 3030, 101st Cong. §§ 101(a), 103, reprinted in II 1990 Legislative History, at 3748-49, 3795-96. The House committee, however, replaced the specific reference to what is now § 107(d)(4) with a general reference to § 107(d). See H.R. Rep. No. 101-490, at 3-6, 17 (1990), reprinted in II 1990 Legislative History, at 3027-30, 3041. The Conference committee then reported the text of the House bill rather than that of the Senate. See H.R. Rep. No. 101-952, at 335 (1990), reprinted in I 1990 Legislative History, at 1785.

Second, our conclusion that the Congress intentionally referred to § 107(d) as a whole is supported by a comparison of Subparts 1 and 2. The Congress enacted Subpart 2 because of the failure of the controls in Subpart 1 to bring areas into attainment with the 0.12 ppm standard in the allotted time. See H.R. Rep. No. 101-490, at 145-50, reprinted in II 1990 Legislative History, at 3169-74. Rather than continue treating all ozone nonattainment areas alike, the Congress allowed the various areas between 3 and 20 years to attain the ozone NAAQS, depending upon the extent of the area's ozone problem. See *id.* at 146-47 ("In 1977, Congress tried to waive [sic] a 'magic wand' and command that all nonattainment areas [for ozone] will meet the applicable [NAAQS]. . . . by December 31, 1987. . . . [That] date[ ] ha[s] come and gone and it is clear that . . . we had no 'magic' solutions."), reprinted in II 1990 Legislative History, at 3170-71. As the petitioners argue, because the 1990 amendments extended the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS, they must preclude the EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS.

Subpart 1 requires compliance with a primary NAAQS "as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment." 42 U.S.C. § 7502(a)(2)(A). All nonattainment areas would have until 2012 to comply with the revised ozone NAAQS if the EPA and the States were to take the full time authorized in Subpart 1 for making attainment designations and the EPA were to approve every possible extension for each area. See *id.* §§ 7407(d)(1)(A)-(B), 7502(a)(2)(A), (C). Such wide discretion is inconsistent, however, with Subpart 2, in which the Congress stripped the EPA of discretion to decide which

ozone nonattainment areas should receive more time to reach attainment (with two limited exceptions not relevant here, see *id.* § 7511(a)(4), (5)). Moreover, under § 181(a) of Subpart 2, Los Angeles, the nation's only Extreme Area, has until 2010 to attain the 0.12 ppm ozone NAAQS, and the possibility of extending that deadline until 2012. That Los Angeles should also have to attain a more stringent ozone standard by that same year, if not earlier, clearly runs counter to the comprehensive enforcement scheme enacted in Subpart 2.

The EPA offers two arguments against this interpretation of Subparts 1 and 2. First, the EPA contends that a recent statute confirms its power to designate nonattainment areas under the revised ozone standard. See Pub. L. No. 105-178, § 6103(a), 112 Stat. 465 (1998) (extending time to two years from one year for governor to submit proposed designation under 0.08 ppm ozone NAAQS). That statute also specifically states, however, that "[n]othing in section [ ] . . . 6103 shall be construed by the Administrator of Environmental Protection Agency or any court . . . to affect any pending litigation or to be a ratification of the ozone . . . standard[ ]." *Id.* § 6104. Further, even if the EPA were correct that § 6103 confirms the agency's power to designate areas under a revised ozone NAAQS, that power was never in doubt, as we concluded above. Indeed, § 6104 simply does not bear upon the question we address here: whether Subpart 1 or Subpart 2 provides the applicable enforcement mechanisms for an area designated nonattainment under a revised ozone NAAQS.

Second, the EPA argues that read in context the reference to § 107(d) in § 181(a)(1) relates only to designations made

under § 107(d)(4). Because the table in § 181(a)(1) classifies areas based upon a design value that roughly measures attainment of the 0.12 ppm ozone NAAQS, the EPA contends that the nonattainment designations referenced in § 181(a)(1) are only those designations made under the 0.12 ppm ozone NAAQS. This explanation, however, does not square with either the Congress's decision not to refer to § 107(d)(4) specifically or the long-term nature of the attainment scheme enacted in Subpart 2; on the EPA's interpretation, that scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments.

The EPA points next to § 181(b)(1), which specifies the attainment dates for areas that met the 0.12 ppm standard when the Congress enacted the 1990 amendments but that later cease to comply. That section, however, applies only to areas designated under § 107(d)(3) that previously were "designated attainment or unclassifiable for ozone under section [107(d)(4)]." That § 181(b)(1) provides special rules for such areas, but not for areas designated under § 107(d)(3) that had previously been designated attainment for ozone or unclassifiable under § 107(d)(1), does not support the EPA's argument that the phrase in § 181(a)(1) "designated nonattainment for ozone pursuant to section 107(d)" denotes only those designations made under § 107(d)(4). If anything, the specification of § 107(d)(4) in § 181(b)(1) makes its absence from § 181(a)(1) all the more striking.

The final bit of context to which the EPA points is the title of § 181(a): "Classification and attainment dates for 1989 nonattainment areas." Because the title specifies "1989 nonattainment areas," we are told, § 181(a) must refer only to

nonattainment designations made immediately after enactment of the 1990 amendments, that is, designations made under § 107(d)(4). Although "the title of a statute or section can aid in resolving an ambiguity in the legislation's text," *INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991), a title cannot be allowed to create an ambiguity in the first place. See *Maguire v. Commissioner of Internal Revenue*, 313 U.S. 1, 9 (1941) ("[T]he title of an act will not limit the plain meaning of the text."). The text of § 181(a) clearly encompasses nonattainment designations made under all subsections of § 107(d). There simply is no ambiguity in need of resolution by reference to the title of the section.

In sum, § 181(a) "specifically provide[s]" for classifications and attainment dates for areas designated nonattainment for ozone pursuant to § 107(d)(1). Accordingly, Subpart 2, not Subpart 1, provides the classifications and attainment dates for any areas designated nonattainment under a revised primary ozone NAAQS, see 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D), and the EPA must enforce any revised primary ozone NAAQS under Subpart 2.

3. The Secondary Ozone NAAQS

The Non-State Petitioners briefly contend that our conclusion that Subpart 2 provides the classifications and attainment dates for areas designated nonattainment under a revised primary ozone NAAQS is equally applicable to the enforcement of a revised secondary ozone NAAQS. We find it impossible to conclude, however, that Subpart 2 "specifically provide[s]" for classifications and attainment dates for areas designated nonattainment with a revised secondary ozone NAAQS; § 181(a)(1) expressly refers only

to primary NAAQS and Subpart 2 not once mentions secondary NAAQS. Further, attainment dates in Subpart 1 for secondary standards are less stringent than for primary standards, making comparison with the more lenient dates in Subpart 2 less troubling. Compare *id.* § 7502(a)(2)(B) (attainment of secondary NAAQS "shall be . . . achieved as expeditiously as practicable after the date such area was designated nonattainment"), with *id.* § 7502(a)(2)(A) (attainment of primary NAAQS "shall be . . . achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment"). Nonetheless, we understand Subpart 2 to codify the Congress's judgment as to what is "as expeditiously as practicable" in reducing an area's level of ozone. Consequently, the EPA is precluded from requiring any steps toward compliance with a revised secondary ozone NAAQS prior to an area's attainment of the 0.12 ppm standard. In areas that meet the 0.12 ppm standard, however, Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS "as expeditiously as practicable."

B. Ozone's Health Benefits

Petitioners presented evidence that according to them shows the health benefits of tropospheric ozone as a shield from the harmful effects of the sun's ultraviolet rays—including cataracts and both melanoma and nonmelanoma skin cancers. In estimating the effects of ozone concentrations, EPA explicitly disregarded these alleged benefits.

EPA explained its decision first as a matter of statutory interpretation. Under the Clean Air Act, EPA's ambient

standards for any pollutant are to be "based on [the] criteria" that EPA has published for that pollutant. 42 U.S.C. § 7409(b)(1) & (2). The "criteria," in turn, are to "reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." *Id.* § 7408(a)(2). The reference to "all identifiable effects" would seem on its face to include beneficent effects.

EPA attempts to avoid this straightforward reading in several ways. First, it points to the term "such pollutant," arguing that the statute requires it to focus exclusively on the characteristics that make the substance a "pollutant." But the phrase "pollutant" is simply a label used to identify a substance to be listed and controlled by the statute. While it is perfectly true that a substance known to be utterly without adverse effects could not make it onto the list, this fact of nomenclature does not visibly manifest a congressional intent to banish consideration of whole classes of "identifiable effects."

EPA also relies on the fact that two of the three specified considerations under § 108(a)(2)'s general mandate refer to "adverse effect[s]":

> The criteria for an air pollutant, to the extent practicable, shall include information on—
>
> (A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

> (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an *adverse* effect on public health or welfare; and
>
> (C) any known or anticipated *adverse* effects on welfare.

Id. § 7408(a)(2) (emphasis added). EPA's argument would be of uncertain force even if all three types of effects specifically required to be considered were spoken of as "adverse effects"; there is no reason to read "adverse" back into the "all identifiable effects" of § 108(a)(2). But as one of the three specified classes refers to "effects" unmodified, *id.* § 7408(a)(2)(A), we can reject EPA's argument without even reaching that issue. That Congress qualified "effects" in clauses (B) and (C) with "adverse" seems only to strengthen the supposition that in (A)—and in the general mandate—it intended to cover *all* health or welfare effects. Therefore if petitioners' contentions are right, clause (A) applies to ozone: the presence of ultraviolet radiation at various levels "alter[s] the effects [of ozone] on public health or welfare" by making them on the whole less malign—perhaps even beneficial.

EPA next argues that Title VI of the Clean Air Act, *id.* §§ 7671-7671q, which mandates certain measures to preserve *stratospheric* ozone, represents a complete consideration of ozone's beneficial role as a UV shield. Petitioners' claim, however, is that ground-level (tropospheric) ozone—the subject of this rule—has a UV-screening function independent of the ozone higher in the atmosphere. EPA points to nothing in the statute that purports to address tropospheric ozone.

Finally, EPA directs us towards legislative history from the 1970 and 1990 Clean Air Act Amendments. The "all

identifiable effects" language, however, dates to the 1967 Amendments. Legislative history from the 1970 and 1990 Congresses cannot be "an authoritative interpretation of what the [1967] statute meant," because it is "the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988).

Under *Chevron*, we defer to an agency's interpretation of a statute if "the statute is silent or ambiguous with respect to the specific issue" and "the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. We find no such ambiguity in this case. Further, EPA's interpretation fails even the reasonableness standard of *Chevron's* second part: it seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance. At oral argument even EPA counsel seemed reluctant to claim that the statute justified disregard of the beneficent effects of a pollutant bearing directly on the health symptoms that accounted for its being thought a pollutant at all (suppose, for example, a chemical that both impedes and enhances breathing, depending on the person or circumstances); he also seemed unable to distinguish that case from the one here—where the chemical evidently impedes breathing but provides defense against various cancers.

Legally, then, EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109. EPA's other arguments are technical, and are of

two sorts: those that allegedly show petitioners' studies to be fatally flawed and those that allegedly show specific inflation of results in these studies. We need only consider the first sort, for EPA chose to give the studies no weight at all.

Petitioners rely primarily on studies by Lutter and Cupitt. EPA found that these could be ignored because the marginal benefits are difficult, if not impossible, to quantify reliably and because there is "no convincing basis for concluding that any such effects . . . would be significant." But these are not the criteria by which EPA assesses adverse health effects. It does not rigorously or uniformly demand either quantifiability, see, e.g., Ozone Final Rule, 62 Fed. Reg. at 38,860/3 (admitting that "quantitative risk estimates could not be developed" for certain adverse effects of ozone on which EPA regulated); EPA Ozone Brief at 48 (defending consideration of various effects that "played an important role in the Administrator's final decision" despite absence of quantification: "EPA did not estimate the risk for such effects because 'information [was] too limited to develop *quantitative* estimates,'—not because there is doubt the effects occur.") (alteration and emphasis in original) (citation omitted), or any specific level of significance. As we can see no reason for imposing a higher information threshold for beneficent effects than for maleficent ones, we have no basis for affirming EPA's decision to disregard the studies.

As we said above, we are remanding to EPA to formulate adequate decision criteria for its ordinary object of analysis—ill effects. We leave it to the agency on remand to determine whether, using the same approach as it does for those, tropospheric ozone has a beneficent effect, and if so, then to

assess ozone's net adverse health effect by whatever criteria it adopts.

IV. *Particulate Matter*

A. PM_{10} as Coarse Particle Indicator

We now turn to petitioners' challenges to the Agency's regulation of coarse particulate pollution. Both the 1987 NAAQS and the proposed standards regulate all particles with diameters under 10 micrometers, signified by the indicator PM_{10}. The PM_{10} spectrum includes both coarse and fine particles. While the main distinction between coarse and fine particles is the process by which they are produced, EPA and epidemiologists who study the health effects of particulate pollution identify coarse and fine particles through rough approximations of those particles' diameters. Coarse particles, which become airborne usually from the crushing and grinding of solids, generally have diameters between 2.5 and 10 micrometers and can thus be identified by the indicator $PM_{10-2.5}$. Fine particles, indicated in these new NAAQS by $PM_{2.5}$, come mainly from combustion or gases and generally have diameters of 2.5 micrometers or less.

Despite EPA's conclusion that coarse and fine particles pose independent and distinct threats to public health, the Agency chose not to adopt an indicator, such as $PM_{10-2.5}$, that would measure only the coarse fraction of PM_{10}. Petitioners make two arguments: that there is no scientific basis for regulating coarse particles at all, and that even if there were, retention of the PM_{10} indicator simultaneously with the establishment of the new fine particle indicator is unsupported by evidence in the record and arbitrary and capricious. We agree with this latter argument.

Beginning with petitioners' first challenge, we think the record contains sufficient evidence to justify the Agency's decision to regulate coarse particulate pollution. While the relationship between PM_{10} pollution and adverse health effects justifying the 1987 NAAQS was well-established, see *NRDC v. EPA*, 902 F.2d 962, 967-68 (D.C. Cir. 1990), two studies contained in the record of these proceedings concentrated specifically on the health effects caused by the coarse fraction of PM_{10} pollution. See Mary Ellen Gordian et al., "Particulate Air Pollution and Respiratory Disease in Anchorage, Alaska," 104 Envtl. Health Persp. 290 (1996) (studying volcanic ash); Brockton J. Hefflin et al., "Surveillance for Dust Storms and Respiratory Diseases in Washington State, 1991," 49 Archives of Envtl. Health 170 (1994) (studying fugitive dust). In addition, the record contains at least nine multivariate analyses finding statistically significant relationships with health effects for both $PM_{2.5}$ and PM_{10}, suggesting that the portion of PM_{10} pollution unaccounted for by $PM_{2.5}$ (i.e., coarse particles) explains some of the observed adverse health effects. In other words, because regression analysis holds the $PM_{2.5}$ component constant, the PM_{10} effect recognized in these equations actually evidences results from coarse particulate pollution. To be sure, petitioners have pointed to some evidence to the contrary. But given that our review is limited to "ascertaining that the choices made by the Administrator were reasonable and supported by the record," and does not include "judg[ing] the merits of competing expert views," *Lead Industries*, 647 F.2d at 1160, we find ample support for EPA's decision to regulate coarse particulate pollution above the 1987 levels.

Having found independent health consequences from coarse particulate pollution, EPA nevertheless decided to regulate the coarse fraction of PM_{10} indirectly, using PM_{10} (which includes both coarse and fine PM) as a "surrogate for coarse fraction particles." PM Final Rule, 62 Fed. Reg. at 38,668/2. While recognizing that $PM_{10-2.5}$ would have served as a satisfactory coarse particle indicator, EPA offers three justifications for its decision to use PM_{10} instead: (1) Both the Gordian and Hefflin studies used PM_{10}, not $PM_{10-2.5}$, as the variable in their models, (2) the PM_{10} standards will work in conjunction with the $PM_{2.5}$ standards by regulating the portion of particulate pollution not regulated by the $PM_{2.5}$ standards, and (3) a nationwide monitoring program for PM_{10} already exists. We find none of these explanations persuasive.

As to the first argument, while acknowledging that the indicator used in the studies captures both coarse and fine particles, EPA nevertheless maintains that PM_{10} is an effective indicator for the regulation of coarse particulate pollution. "Adopting the indicator used in the studies," the Agency says, "increases the likelihood that the level selected will result in the health protections predicted." But as EPA's own staff paper suggests, PM_{10} is "inherently confounded" by the presence of $PM_{2.5}$ particles, meaning that any regulation of PM_{10} pollution will include both coarse and fine particles. See PM Staff Paper at V-59. Using PM_{10} as the coarse particle indicator, instead of $PM_{10-2.5}$, will thus regulate more than just the coarse fraction of PM_{10}, and the amount of coarse particulate pollution permitted will depend (quite arbitrarily) on the amount of $PM_{2.5}$ pollution in the air. For example, assuming the 50 microgram annual PM_{10} level adopted by the Agency and a region with an annual $PM_{2.5}$

pollution level of 15 micrograms, the PM_{10} indicator would prohibit coarse particulate ($PM_{10-2.5}$) pollution from exceeding 35 micrograms. But in an area with only 5 micrograms of $PM_{2.5}$ pollution, the NAAQS would permit coarse particulate pollution to reach as high as 45 micrograms.

EPA's second argument—that the PM_{10} standard will work in conjunction with the $PM_{2.5}$ standard—suffers from the same deficiency. Accepting EPA's finding of "profound physicochemical differences" between coarse and fine PM, PM Staff Paper at V-59, such that each requires independent regulation, we cannot discern exactly how a PM_{10} standard, instead of a $PM_{10-2.5}$ standard, will work alongside a $PM_{2.5}$ standard to regulate only the coarse fraction of PM_{10}. EPA provides no explanation to aid us in understanding its decision. In fact, as the example above indicates, it is the very presence of a separate $PM_{2.5}$ standard that makes retention of the PM_{10} indicator arbitrary and capricious. Far from working in conjunction to regulate coarse particles, PM_{10} and $PM_{2.5}$ indicators, when used together, lead to "double regulation" of the $PM_{2.5}$ component of PM_{10} and potential underregulation of the $PM_{10-2.5}$ component since the amount of $PM_{10-2.5}$ permitted will always depend on the amount of $PM_{2.5}$ in the air.

EPA's final argument is pragmatic. It maintains that PM_{10} is a better indicator than $PM_{10-2.5}$ for coarse particulate pollution because a nationwide monitoring program for PM_{10} already exists. But as EPA acknowledges elsewhere in its brief, *NRDC* bars EPA from considering factors unrelated to public health in setting air quality standards. Echoing our decision in *Vinyl Chloride*, *NRDC* held that "the

Administrator may not consider cost and technological feasibility in determining what is 'safe'; such a determination 'must be based solely upon the risk to health.'" *NRDC*, 902 F.2d at 973 (quoting *Vinyl Chloride*, 824 F.2d 1146, 1166 (D.C. Cir. 1987) (in banc)); see also *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Industries*, 647 F.2d at 1148-55. The administrative convenience of using PM_{10} cannot justify choosing an indicator poorly matched to the relevant pollution agent.

In view of our conclusion that PM_{10} amounts to an arbitrary indicator for coarse particle pollution, we need not address petitioners' separate challenge to the PM_{10} levels or secondary standards. We note, however, that whatever levels the Agency ultimately selects for coarse particle pollution will need to comply with the requirements set forth in Part I of this opinion.

B. Fine Particles as "New Pollutant"

The Attorneys General of Ohio, Michigan, and West Virginia ("state petitioners") argue that EPA is regulating $PM_{2.5}$ for the first time. Because they consider $PM_{2.5}$ to be a "new pollutant," they argue that § 108 of the Clean Air Act requires EPA to conduct further research on $PM_{2.5}$'s health effects before listing it as a pollutant, to issue an air quality criteria document reflecting the latest science on the health effects of the pollutant, and to assist states by developing "data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology." 42 U.S.C. § 7408(b)(1).

Although EPA never responds to this argument, five northeastern states (as respondent intervenors and amici) do. Pointing out that previous NAAQS have always included $PM_{2.5}$, these attorneys general support the EPA's decision not to list $PM_{2.5}$ separately as a new pollutant. We agree.

The state petitioners cannot escape the fact that the original standards for particulate pollution using Total Suspended Particulates (TSP) as indicator, as well as the 1987 NAAQS that used PM_{10}, included by definition every particle 2.5 micrometers and smaller. Moreover, in some areas fine particles often dominate PM_{10} pollution. See PM Staff Paper at V-63. By refining the NAAQS to focus on smaller particles that EPA found posed distinct threats to public health, EPA has done with these regulations exactly what we held it could do in 1987 when it made the change from Total Suspended Particulates to PM_{10}. See *NRDC*, 902 F.2d at 965-66. EPA's decision to update the NAAQS to focus on $PM_{2.5}$ merely continues a trend based on evolving science. It does not violate the provisions of § 108 of the Clean Air Act.

C. Failure to Identify a Biological Mechanism for Particulate Pollution's Relationship to Adverse Health Effects

Also challenging the establishment of a fine particle standard, non-state petitioners argue that EPA failed to explain the biological mechanism through which particulate pollution causes adverse health effects. Even if epidemiological studies show robust statistical relationships between pollution and health effects, they say, the absence of proof of causation—i.e., how particles actually interact with

cells and organs to cause sickness and death—is fatal to the standard. We disagree.

To begin with, the statute itself requires no such proof. The Administrator may regulate air pollutants "emissions of which, in his judgment, *cause or contribute* to air pollution which may *reasonably be anticipated* to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A) (1994) (emphasis added). Moreover, this court has never required the type of explanation petitioners seek from EPA. In fact, we have expressly held that EPA's decision to adopt and set air quality standards need only be based on "reasonable extrapolations from some reliable evidence." *NRDC v. Thomas*, 805 F.2d 410, 432 (D.C. Cir. 1986). Indeed, were we to accept petitioners' view, EPA (or any agency for that matter) would be powerless to act whenever it first recognizes clear trends of mortality or morbidity in areas dominated by a particular pathogen.

The numerous epidemiological studies appearing in this record, some of which EPA also used to support the 1987 NAAQS, easily satisfy the standard articulated in the statute and emphasized repeatedly in decisions of this court. Covering diverse geographic locations with widely varying mixes of air pollution, the studies found statistically significant relationships between air-borne particulates signified by a variety of indicators and adverse health effects. Given EPA's statutory mandate to establish standards based on "the latest scientific knowledge," 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards.

D. Visibility Effects

The Environmental Petitioners challenge the EPA's decision to set the secondary $PM_{2.5}$ NAAQS at levels equivalent to the primary NAAQS. According to the petitioners, the EPA's failure to set the secondary NAAQS at more stringent levels will result in "adverse visibility impacts" in parts of the country. In view of our conclusion in Part I, above, that the EPA has not adequately explained the principles upon which it relied in setting the levels in the NAAQS for PM, we need not reach the main thrust of the petitioners' challenge to the secondary NAAQS. On the other hand, the Environmental Petitioners have also raised a question of statutory interpretation, the resolution of which should assist the EPA if it revisits its decision to set the secondary $PM_{2.5}$ NAAQS.

In the PM Final Rule, the EPA decided "to address the welfare effects of PM on visibility by setting secondary standards identical to the suite of $PM_{2.5}$ primary standards, in conjunction with the establishment of a regional haze program under § 169A of the Act." PM Final Rule, 62 Fed. Reg. at 38,679/3. Section 169A "declares as a national goal the prevention . . . and the remedying of any . . . impairment of visibility in mandatory class I Federal areas . . . result[ing] from manmade air pollution." 42 U.S.C. § 7491. Mandatory class I areas include all international parks, and national parks and wilderness areas of a certain size. See 42 U.S.C. § 7472(a). The EPA concluded that reduction of $PM_{2.5}$ levels in class I areas would benefit the surrounding areas as well because "the same haze that degrades visibility within or looking out from a national park also degrades visibility outside it." PM Final Rule, 62 Fed. Reg. at 38,682/1.

The Environmental Petitioners argue that § 109(b)(2), 42 U.S.C. § 7409(b)(2), requires the EPA to set secondary NAAQS at a level sufficient to eliminate all adverse visibility effects and that it leaves the EPA no discretion to decide that some visibility impairment is better remedied through another program. This argument must be wrong. For, as the EPA argues, the Congress required the EPA to implement a regional haze program specifically in order to address adverse visibility effects that persist in class I areas after attainment of the secondary NAAQS. See 42 U.S.C. § 7470(1) (purpose of this part of Clean Air Act is "to protect public . . . welfare from any actual or potential adverse effect which . . . may reasonably be anticipate[d] to occur . . . notwithstanding attainment and maintenance of all [NAAQS]"). Accordingly, we conclude that the Congress did not intend the secondary NAAQS to eliminate all adverse visibility effects and, therefore, that the EPA acted within the scope of its authority in deciding to rely upon the regional haze program to mitigate some of the adverse visibility effects caused by $PM_{2.5}$.

Conclusion

We remand the cases to EPA for further consideration of all standards at issue. We do not vacate the new ozone standards because the standard is unlikely to engender costly compliance activities in light of our determination that it cannot be enforced by virtue of Clean Air Act § 181(a), 42 U.S.C. § 7511(a). We vacate the challenged coarse particulate matter standards because EPA will have to develop different standards when it corrects the arbitrarily chosen PM_{10} indicator. As to the fine particulate matter standards, we invite briefing on the question of remedy:

possibilities include but are not limited to vacatur, non-vacatur subject to application to vacate, and non-vacatur.[8] An order giving the briefing particulars will follow.

Because of the substantial investment of time this matter has required and the many unresolved issues bearing on application of whatever standards may emerge, this panel will in the interest of judicial economy retain jurisdiction over the cases following remand. See *Sierra Club v. Gorsuch*, 715 F.2d 653, 661 (D.C. Cir. 1983).

TATEL, *Circuit Judge*, dissenting from Part I:

The Clean Air Act has been on the books for decades, has been amended by Congress numerous times, and has been the subject of regular congressional oversight hearings. The Act has been parsed by this circuit no fewer than ten times in published opinions delineating EPA authority in the NAAQS-setting process. Yet this court now threatens to strike down section 109 of the Act as an unconstitutional delegation of congressional authority unless EPA can articulate an intelligible principle cabining its discretion. In doing so, the court ignores the last half-century of Supreme Court nondelegation jurisprudence, apparently viewing these permissive precedents as mere exceptions to the rule laid down 64 years ago in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Because section 109's delegation of authority is narrower and more principled than delegations the Supreme Court and this court have upheld

[8] Briefing should address the possibility that the previous particulate matter standard will spring back to life in response to our decision to vacate the new coarse particulate matter standard.

since *Schechter Poultry*, and because the record in this case demonstrates that EPA's discretion was in fact cabined by section 109, I respectfully dissent.

Section 109 requires EPA to publish air quality standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (1994). Compare section 109 to the language of section 303 of the Communications Act of 1934, which gave the FCC authority to regulate broadcast licensing in the "public interest," and which the Supreme Court sustained in *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). The FCC's general authority to issue regulations "as public convenience, interest, or necessity requires" was sustained in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The Supreme Court has sustained equally broad delegations to other agencies, including the Price Administrator's authority to fix "fair and equitable" commodities prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), the Federal Power Commission's authority to determine "just and reasonable" rates, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944), the War Department's authority to recover "excessive profits" earned on military contracts, *Lichter v. United States*, 334 U.S. 742, 778-786 (1948), and the Attorney General's authority to regulate new drugs that pose an "imminent hazard to public safety," *Touby v. United States*, 500 U.S. 160, 165 (1991). *See also Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998) (upholding delegation to Secretary of Agriculture to approve interstate compacts upon a finding of "compelling public interest").

Given this extensive Supreme Court precedent sustaining general congressional delegations, no wonder the First Circuit rejected a similar nondelegation challenge to the Clean Air Act's "requisite to protect the public health" language:

> The power granted to EPA is not "unconfined and vagrant". [*Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring).] The Agency has been given a well defined task by Congress—to reduce pollution to levels "requisite to protect the public health", in the case of primary standards. The Clean Air Act outlines the approach to be followed by the Agency and describes in detail many of its powers. . . . Yet there are many benchmarks to guide the Agency and the courts in determining whether or not EPA is exceeding its powers, not the least of which is that the rationality of the means can be tested against goals capable of fairly precise definition in the language of science.
>
> Administrative agencies are created by Congress because it is impossible for the Legislature to acquire sufficient information to manage each detail in the long process of extirpating the abuses identified by the legislation; the Agency must have flexibility to implement the congressional mandate. Therefore, although the delegation to EPA was a broad one, . . . we have little difficulty concluding that the delegation was not excessive.

South Terminal Corp. v. EPA, 504 F.2d 646, 677 (1st Cir. 1974).

I do not agree with my colleagues that *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) ("*Lockout/Tagout I*"), requires a different result. That case remanded to OSHA for a more precise definition of section 3(8) of the Occupational Safety and Health Act, which granted the Agency authority to enact workplace safety standards "reasonably necessary or appropriate to provide safe or healthful employment or places of employment." *Id.* at 1316. The Clean Air Act does not delegate to EPA authority to do whatever is "*reasonably* necessary or appropriate" to protect public health. Instead, the statute directs the Agency to fashion standards that are "requisite" to protect the public health. In other words, EPA must set pollution standards at levels *necessary* to protect the public health, whether "reasonable" or not, whether "appropriate" or not.

Moreover, in setting standards "requisite to protect the public health," EPA discretion is not unlimited. The Clean Air Act directs EPA to base standards on "air quality criteria" that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(2); *see id.* § 7409(b)(1); *see also id.* § 7408(a)(2) (requiring air quality criteria, "to the extent practicable," to "include information on — (A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant; (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and (C) any

known or anticipated adverse effects on welfare"). Indeed, the principles constraining EPA discretion are at least as specific as those this court sustained in *Lockout/Tagout II*, i.e., that OSHA must identify a "'significant' safety risk, to enact a safety standard that provides 'a high degree of worker protection'." *International Union, UAW v. OSHA*, 37 F.3d 665, 669 (D.C. Cir. 1994) (*"Lockout/Tagout II"*). By directing EPA to set NAAQS at levels "requisite"—not reasonably requisite—to protect the public health with "an adequate margin of safety," the Clean Air Act tells EPA exactly the same thing, i.e., ensure a high degree of protection.

Although this court's opinion might lead one to think that section 109's language permitted EPA to exercise unfettered discretion in choosing NAAQS, the record shows that EPA actually adhered to a disciplined decisionmaking process constrained by the statute's directive to set standards "requisite to protect the public health" based on criteria reflecting the "latest scientific knowledge." To identify which health effects were "significant enough" to warrant protection, EPA followed guidelines published by the American Thoracic Society. *See National Ambient Air Quality Standards for Ozone: Proposed Decision*, 61 Fed. Reg. 65,716, 65,722/1 (1996). It then set the ozone and fine particle standards within ranges recommended by CASAC, the independent scientific advisory committee created pursuant to section 109 of the Act. *See* 42 U.S.C. § 7409(d)(2).

CASAC must consist of at least one member of the National Academy of Sciences, one physician, and one person representing state air pollution control agencies. *See*

id. § 7409(d)(2)(A). In this case, CASAC also included medical doctors, epidemiologists, toxicologists and environmental scientists from leading research universities and institutions throughout the country. EPA must explain any departures from CASAC's recommendations. *See id.* § 7607(d)(3). Bringing scientific methods to their evaluation of the Agency's Criteria Document and Staff Paper, CASAC provides an objective justification for the pollution standards the Agency selects. *Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) ("'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology today is what distinguishes science from other fields of human inquiry.'") (citation omitted). Other federal agencies with rulemaking responsibilities in technical fields also rely heavily on the recommendations, policy advice, and critical review that scientific advisory committees provide. *See, e.g.*, 21 U.S.C. § 355(n) (describing scientific advisory panels for the Food and Drug Administration); 49 U.S.C. § 44912(c) (creating a scientific advisory panel for the Federal Aviation Administration).

Beginning with CASAC's ozone recommendations—not one member recommended going below .08 ppm—EPA gave two perfectly rational explanations for the level it selected. First, it set the annual level based on the different types of health effects observed above and below .08 ppm. Particularly below .08, the Agency determined, "[t]he most certain [ozone-]related effects, while judged to be adverse, are *transient and reversible*." *National Ambient Air Quality Standards for Ozone*, 62 Fed. Reg. 38,856, 38,868/2 (1997) (emphasis added). Characterizing this explanation as saying nothing more than that "lower exposure levels are associated

with lower risk to public health," Maj. Op. at 10, my colleagues find the Agency's reasoning unintelligible. But EPA did not find simply that public health risks decrease at lower levels. Instead, it found that public health effects *differ* below .08 ppm, i.e., that they are "transient and reversible."

Second, EPA explained that the level should not be set below naturally occurring background ozone concentrations. The Agency selected .08 ppm because it found that "a 0.07 ppm level would be closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of [ozone] precursors, and thus more likely to be inappropriately targeted in some areas on such sources." 62 Fed. Reg. at 38,868/3. Of course, any level of ozone pollution above background concentrations is closer to background levels than one just above it. *See* Maj. Op. at 11. But as I read EPA's explanation, the Agency found that peak background levels sometimes occur at .07 ppm, not at .08 ppm. Indeed, the data EPA provided in its "Responses to Significant Comments" show a range of background concentrations from a low of .042 ppm in Olympic National Park in Washington to a high of .075 ppm in Quachita National Forest in Arizona. No region registered background levels above .075 ppm. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPONSES TO SIGNIFICANT COMMENTS ON THE 1996 PROPOSED RULE ON THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE 94-96 (July 1997). In other words, by setting the annual standard at .08 rather than .07 ppm, EPA ensured that if a region surpasses the ozone standard, it will do so because of controllable human activity, not because of uncontrollable natural levels of ozone.

EPA offered an equally reasonable explanation for the fine particle pollution standard. Again limiting itself to the range approved by CASAC, EPA set the annual standard for $PM_{2.5}$ pollution at the lowest level where it had confidence that the epidemiological evidence (filtered through peer-reviewed, published studies) displayed a statistically significant relationship between air pollution and adverse public health effects.

Recognizing that its decision must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health," 42 U.S.C. § 7408(a)(2), EPA focused on three studies in the record that displayed a statistically significant relationship between fine particle pollution and adverse health effects: Joel Schwartz et al., *Is Daily Mortality Associated Specifically with Fine Particles?*, 46 J. AIR & WASTE MGMT. ASS'N 927 (1996); Joel Schwartz et al., *Acute Effects of Summer Air Pollution on Respiratory Symptom Reporting in Children*, 150 AM. J. RESPIRATORY & CRITICAL CARE MED. 1234 (1994); and Douglas W. Dockery et al., *An Association between Air Pollution and Mortality in Six U.S. Cities*, 329 NEW ENG. J. MED. 1753 (1993). The Agency explained that "there is generally *greatest statistical confidence* in observed associations [between fine particle pollution and adverse health effects] for levels at and above the mean concentration [of pollution observed in the studies that showed a statistically significant relationship]." *National Ambient Air Quality Standards for Particulate Matter*, 62 Fed. Reg. 38,652, 38,676/1 n.42 (1997) (emphasis added). Allowing "an adequate margin of safety," EPA then set the annual fine particle standard just below the lowest mean pollution levels observed in those studies, at 15 $\mu g/m^3$. *See id.* at 38,676/1

("An examination of the long-term means from the combined six city analyses of daily mortality [Schwartz et al. (1996)] and morbidity [Schwartz et al. (1994)], together with those from studies in individual cities for which statistically significant PM-effects associations are reported . . . finds mean concentrations ranging from about 16 to about 21 $\mu g/m^3$. . . ."); *id.* at 38,676/2 ("[The EPA] Staff Paper assessment of the concentration-response results [from Dockery et al. (1993)], concluded that the evidence for increased risk was more apparent at annual concentrations at or above 15 $\mu g/m^3$. . . .").

In a passage directly answering this court's concerns, *see* Maj. Op. at 11-12, the Staff Paper explained why the long-term mean served as a reasonable level for setting the fine particle NAAQS:

> The mean (or median) concentration may serve as a reasonable cutpoint of increased PM health risk since at this point there is generally the *greatest confidence* (i.e., the smallest confidence intervals) in the association and the reported [relative risk] estimates. The mean concentration considered by staff as most informative to test implications of potential alternative concentration-response functions is the *minimum mean concentration* associated with a study or studies reporting statistically significant increases in risk across a number of study locations. . . .

OFFICE OF AIR QUALITY PLANNING AND STANDARDS, U.S. ENVIRONMENTAL PROTECTION AGENCY, REVIEW OF NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER: POLICY ASSESSMENT OF SCIENTIFIC

AND TECHNICAL INFORMATION, at E-4 (1996) (emphasis added).

EPA thus did not, as my colleagues charge, arbitrarily pick points on the ozone and particulate pollution continua indistinguishable from any other. Instead, acting pursuant to section 109's direction that it establish standards that, based on the "latest scientific knowledge" are "requisite" to protect the public health with "an adequate margin of safety," and operating within ranges approved by CASAC, the Agency set the ozone level just above peak background concentrations where the most certain health effects are not transient and reversible, and the fine particle level at the lowest long-term mean concentration observed in studies that showed a statistically significant relationship between fine particle pollution and adverse health effects. Whether EPA arbitrarily selected the studies it relied upon or drew mistaken conclusions from those studies (as petitioners argue), or whether EPA failed to live up to the principles it established for itself (as my colleagues believe, *see* Maj. Op. at 9-12), has nothing to do with our inquiry under the nondelegation doctrine. Those issues relate to whether the NAAQS are arbitrary and capricious. *See NRDC v. EPA*, 902 F.2d 962, 969, 971 (D.C. Cir. 1990). The Constitution requires that Congress articulate intelligible principles; Congress has done so here.

A final point. Unlike OSHA, which *Lockout/Tagout I* recognized has authority to reach into every workplace to dictate what is safe, to impose extensive civil and criminal penalties, and "to decide which firms will live and which will die," *Lockout/Tagout I*, 938 F.2d at 1318, EPA regulates primarily by setting standards for states to develop their own

plans. *See* 42 U.S.C. § 7401(a)(3) (Congress finds "that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."). Indeed, because states have three years to submit implementation plans, which are themselves subject to notice, comment, public hearing, and frequent renegotiation, we will not know for years precisely how the ozone and particle NAAQS will actually affect individual businesses. Only if a state fails to produce an acceptable plan can EPA terminate federal highway funds or impose its own implementation plan. Because the Clean Air Act gives politically accountable state governments primary responsibility for determining how to distribute the burdens of pollution reduction and therefore how the NAAQS will affect specific industries and individual businesses, courts have less reason to second-guess the specificity of the congressional delegation. Moreover, if the states disagree with the standards EPA has set, they have 535 representatives in Congress to turn to for help. In fact, legislation to overturn the very NAAQS at issue in this case was introduced in the last Congress. *See* H.R. 1984, 105th Cong. (1997) ("A bill to provide for a four-year moratorium on the establishment of new standards for ozone and fine particulate matter under the Clean Air Act, pending further implementation of the Clean Air Act Amendments of 1990, additional review and air quality monitoring under that Act."); S. 1084, 105th Cong. (1997) ("A bill to establish a research and monitoring program for the national ambient air quality standards for ozone and particulate matter and to reinstate the original standards under the Clean Air Act, and for other purposes.").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1546, 97-1548, 97-1551 to 97-1553,
97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567,
97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579,
97-1582, 97-1585 to 97-1588, 97-1592,
97-1594, 97-1596 to 97-1598

No. 97-1441

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1502, 97-1505, 97-1508 to 97-1510,
97-1512 to 97-1514, 97-1518, 97-1519, 97-1526, 97-1531,
97-1539, 97-1566, 97-1568, 97-1570, 97-1572, 97-1575,
97-1584, 97-1589, 97-1591, 97-1595, 97-1619

[Filed October 29, 1999]

BEFORE: WILLIAMS, GINSBURG, AND TATEL, *Circuit Judges*.

Opinion *per curiam* on petitions for rehearing.

Opinion concurring in partial grant of rehearing and dissenting in part from the panel's denial of rehearing filed by *Circuit Judge* TATEL.

ORDER

PER CURIAM

This matter is before the court for consideration of respondent Environmental Protection Agency's (EPA) petition for panel rehearing in Nos. 97-1440 and 97-1441, the responses thereto, and the petitions for panel rehearing of intervenors-respondents New Jersey and Massachusetts in Nos. 97-1440 and 97-1441, Citizen for Balanced Transportation, et al. in No. 97-1440, and the American Lung Association in Nos. 97-1440 and 97-1441. Upon consideration of the foregoing, it is

ORDERED that the petitions of EPA, New Jersey and Massachusetts, and the American Lung Association be granted in part. The court accordingly modifies Parts III.A.2 & .3 and the conclusion of the court's original opinion as set forth in the opinion of the court filed herein this date. It is

FURTHER ORDERED that the remainder of EPA, New Jersey and Massachusetts, and the American Lung Association's petitions be denied and that Citizen for Balanced Transportation's petition be denied.

Opinion for the Court filed *PER CURIAM*:

The Environmental Protection Agency petitions for rehearing, challenging this court's holdings that: (1) with respect to the factors the agency uses to determine the degree of public health concern associated with different levels of a pollutant, it "appears to have articulated no 'intelligible principle' to channel its application of these factors; nor is one apparent from the statute," *American Trucking Ass'ns v.*

United States Environmental Protection Agency, 175 F.3d 1027, 1034 (D.C. Cir. 1999); (2) "Subpart 2, not Subpart 1, provides the classifications and attainment dates for any areas designated nonattainment under a revised primary ozone NAAQS, and the EPA must enforce any revised primary ozone NAAQS under Subpart 2," *id.* at 1050; and (3) "EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109," *id.* at 1052. For the following reasons, we grant the petition for rehearing in part and deny it in part.

I. Delegation

In the EPA's petition for rehearing, counsel for the agency argue that § 109 of the Clean Air Act contains the following principle limiting the agency's discretion: "The levels [set in a NAAQS] must be *necessary* for public health protection: neither *more* nor *less* stringent than necessary, but 'requisite.'" EPA Pet. at 8 (emphases in original). Further, counsel claim that in setting the NAAQS at issue in this case the agency applied corollaries of this principle, one for particulate matter, one for ozone,[1] to derive determinate standards.

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[1] For particulate matter, counsel now state that the EPA's decision was determined by the norm of "the 95 percent confidence level to separate results that could be the product of chance from more convincing evidence of causation." EPA Pet. at 15. For ozone, counsel now state that EPA inferred the existence of effects below 0.08 ppm, but nonetheless concluded that they were "less serious because they are 'transient and reversible.'" EPA Pet. at 16.

In denying the EPA's petition for rehearing on this issue, we note that the agency previously put forward neither the assertedly intelligible principle its counsel now claim to find in the statute nor the corollaries its counsel now implicitly derive therefrom. To be sure, in the rulemakings that set the NAAQS, the EPA mentioned the corollary propositions its counsel now claim served as intelligible limiting principles, but the agency did not identify either as a limit upon its discretion; the EPA never suggested that it could not (or in a later rulemaking would not) base a NAAQS upon evidence that did not meet the 95 percent confidence level or that revealed adverse but transient effects.[2] In its briefs defending the NAAQS, the EPA merely asserted that the Clean Air Act provides an intelligible principle; it failed both to state that principle and to argue that its revised NAAQS were promulgated in accordance with that principle. EPA PM Brief at 145-49; EPA Ozone Brief at 77-80. Indeed, the EPA's briefs in each of these two cases contained the same four sentences assuring the court that the statute provides a principle without explaining what the agency understands that principle to be:

> [Section] 109(b)(1) requires EPA to promulgate NAAQS based on air quality criteria issued under § 108 that are "requisite to protect the public health" with "an adequate margin of safety." This language and related legislative history provide directions for EPA to follow in setting the NAAQS. Moreover, EPA has consistently

[2] The court's opinion mentioned EPA's observation in the record that effects of ozone concentrations below the standard selected were "transient and reversible," 175 F.3d at 1035, but only in connection with the dissent's suggestion, *see id.* at 1059, that this was the controlling principle.

> interpreted § 109(b)(1) to provide further decisionmaking criteria to guide the standard setting process. Thus, the CAA provides a more than sufficient "intelligible principle" to guide EPA's discretion. EPA Ozone Brief at 78; *see also* EPA PM Brief at 148.

These sentences begged the key question about that intelligible principle: "What is it?"

As we noted in our first opinion in this case, when "statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038. Counsel for the EPA have now extracted from the statute what they contend is an intelligible principle limiting the EPA's discretion. We express no opinion upon the sufficiency of that principle; only after the EPA itself has applied it in setting a NAAQS can we say whether the principle, in practice, fulfills the purposes of the nondelegation doctrine. *See Yakus v. United States*, 321 U.S. 414, 424-26 (1944); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (Leventhal, J., for three-judge panel).

A final word about our nondelegation holding: The Supreme Court has long held that an ambiguous principle in a statute delegating power to an agency can gain "meaningful content from the purpose of the Act, its factual background and the statutory context in which [it] appear[s]." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946); *see also Federal Radio Comm'n v. Nelson Bros. Bond & Mort. Co.*,

289 U.S. 266, 285 (1933) (upholding delegation to Federal Radio Commission to grant licenses "as public convenience, interest or necessity requires" in light of "its context [and] the nature of radio transmission and reception"); *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (upholding delegation to the Federal Home Loan Bank Board to promulgate regulations for the appointment of a conservator for savings and loan associations in view of the banking industry's "well-defined practices for the appointment of conservators"). This court has done the same. *See, e.g., National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 376 n.12 (1982) (finding an intelligible principle to guide the tribunal in disbursing cable royalty fees in "specific statements in the legislative history and in the general philosophy of the Act itself"); *Amalgamated Meat Cutters*, 337 F. Supp. at 747-49 (interpreting the Economic Stabilization Act of 1970 in light of "the historic context of government stabilization measures" in order to "negative[ ] a conclusion that the whole program was set adrift without a rudder"). To choose among permissible interpretations of an ambiguous principle, of course, is to make a policy decision, and since *Chevron* it has been clear that "[t]he responsibilities for assessing the wisdom of such policy choices . . . are not judicial ones." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984). Accordingly, just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority. *But see* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969) (arguing that "judicial inquiries [under the nondelegation doctrine] should shift from statutory standards

to administrative safeguards"). In sum, the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*. *See Industrial Union Dep't v. American Petroleum Inst. (Benzene)*, 448 U.S. 607, 642, 646 (1980) (Stevens, J., plurality) (interpreting § 3(8) of the Occupational Health and Safety Act to require "a threshold finding . . . that significant risks are present," thereby finding in the statute an intelligible principle).[3]

II. Subpart 2 and the Revised Ozone Standard

In its petition for rehearing, the EPA challenges the holdings in Parts III.A.2 and III.A.3 of our original opinion, *see* 175 F.3d at 1048-51, as well as our jurisdiction to reach those issues. We address the jurisdictional point first.

A. Jurisdiction

The EPA argues that because it has taken no final action implementing the revised NAAQS this court lacks jurisdiction to reach the question whether Subpart 2 prevents the agency from implementing a revised ozone NAAQS under Subpart 1. *See* 42 U.S.C. § 7607(b) (limiting this court's jurisdiction to review of "nationally applicable regulations promulgated, or final agency action taken, by the

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[3] We note that Judge Silberman's dissent from the denial of rehearing *en banc* turns largely on his dim view of the Court's use of the non-delegation doctrine in *Benzene*, which he characterizes as "only a makeweight, tossed into the analysis . . . to help justify the result." Whatever the merits of Judge Silberman's critique of *Benzene*, we do not see how a lower court can properly rest its jurisprudence on the rejection of a Supreme Court decision.

Administrator"); *see also Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987).[4] That this claim is raised for the first time in a petition for rehearing does not, of course, alter our obligation to "satisfy [our]self ... of [our] own jurisdiction." *Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1012-13 (1998).

Whether agency action is final for purposes of § 7607(b) entails a functional, not a formal, inquiry. *See NRDC v. EPA*, 22 F.3d 1125, 1132-33 (D.C. Cir. 1994); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Once the agency publicly articulates an unequivocal position ... and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review"). In this case, "there is nothing tentative about the EPA's interpretation of [Subpart 2]; it is unambiguous and devoid of any suggestion that it might be subject to subsequent revision." *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990); *see also* Final Rule: National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,885/2 (1997) ("There is no language in sections 181 or 182 that precludes the implementation of a different [ozone] standard under other authority [i.e., Subpart 1]; those provisions [i.e., Subpart 2] simply govern the implementation of the 1-hour, 0.12 ppm O_3 standard"). Moreover, by promulgating a revised ozone NAAQS the EPA has triggered the provisions of §§ 107(d)(1) and 172, which impose a number of

[4] The EPA has yet to designate an area nonattainment. Therefore, although the agency does not so argue, if it were correct, then this court would also lack jurisdiction to decide, as it did, that Subpart 2 does not alter the agency's power to designate areas as nonattainment under a revised NAAQS. *See* 175 F.3d at 1047-48.

requirements upon the states, the first being that the Governor of each state must determine which areas do not presently comply with the revised NAAQS; those areas that do not comply will ultimately be required to do so. The EPA, therefore, has reached a final decision regarding its power to implement its revised ozone standard, which this court has jurisdiction to review.[5]

The EPA also argues that the statements in its preamble regarding implementation are not "ripe for review," a point which it raised in a single sentence in its original brief to this court. EPA Pet. at 19; EPA Ozone Brief at 74. The question whether Subpart 2 prevents the EPA from designating an area as nonattainment under its revised ozone standard or from implementing that designation except in conformity with Subpart 2 is a pure question of law, the resolution of which would not benefit from a more concrete setting. As the agency's action is undoubtedly final, the question is fit for

[5] The EPA attempts to buttress its jurisdictional argument by reference to 42 U.S.C. § 7502(a)(1)(B), which it claims "defers challenges to EPA's implementation decisions classifying areas for setting attainment dates until EPA takes final action on a SIP ... or triggers sanctions ... [after] a state fails to submit a SIP." EPA Pet. at 19. The section to which the EPA refers states as follows: "The Administrator shall publish a notice in the Federal Register announcing each [attainment or nonattainment] classification.... Such classification ... shall not be subject to judicial review until the Administrator takes final action under [the statutes the EPA cites in its petition]." That is, the EPA's decision to classify a particular area as attainment or nonattainment is not subject to review merely because the EPA published that decision in the Federal Register. Neither this section nor the analogous § 7511(a)(3), to which the EPA also cites, prevents a court from deciding, prior to the classification of a particular area, whether the agency has validly promulgated a revised standard.

review. *See Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540-41 (D.C. Cir. 1999).

B. Subpart 2 and the EPA's Authority to Enforce a Revised Ozone Standard

The EPA's arguments in its petition for rehearing do not convince us that we erred in rejecting the EPA's contention that "the reference to § 107(d) in § 181(a)(1) relates only to designations made under § 107(d)(4)," 175 F.3d at 1050, and in holding instead that "§ 181(a) clearly encompasses nonattainment designations made under all subsections of § 107(d)." *Id.* Indeed, we note that the EPA has abandoned its original position, arguing now that the "most logical reading" of § 181(a) is that the reference to § 107(d) includes §§ 107(d)(1)(C) and 107(d)(4). EPA Pet. at 24. We find this new reading no more persuasive than the old. As the EPA notes, all five Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d). *See* 42 U.S.C. §§ 7502(a)(1)(A), 7511(a)(1), 7512(a)(1), 7513(a), 7514(a). It is by no means clear, however, that the references to § 107(d) in Subparts 1 and 3 through 5 include only designations made under §§ 107(d)(1)(C) and (d)(4). Not only does the EPA never argue that they are so limited, but on its theory the reference to § 107(d) in Subpart 1 also encompasses designations made under § 107(d)(1)(A). EPA Pet. at 25. Accordingly, we reject the EPA's new interpretation of § 181(a), for it is contrary to "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

Still, the EPA does raise two points relating to Subpart 2 which lead us to grant the EPA's petition for rehearing in part and to make the following revisions to our opinion.

The EPA correctly points out that we erroneously treated the attainment dates in the table in Subpart 2 as representing the Congress's judgment about what is "as expeditiously as practicable" in reducing the level of ozone in an area; in fact, those dates represent what the Congress set as outer limits. *See* 42 U.S.C. § 7511(a)(1) ("For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1"). EPA Pet. at 25 n.35. Accordingly, we grant the EPA's petition for rehearing to the extent of deleting the final three sentences of Part III.A.3, *see* 175 F.3d at 1051, and substituting for them the following sentence:

> Therefore, we conclude that Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS "as expeditiously as practicable."

The EPA also contends that the conclusion to Part III.A.2, *see id.* at 1050 ("the EPA must enforce any revised primary ozone NAAQS under Subpart 2"), conflicts with our description of that same conclusion at the end of the opinion, *see id.* at 1057 (revised ozone NAAQS "cannot be enforced by virtue of [Subpart 2]"). We agree that the two sentences are in tension. To clarify the matter, we grant the EPA's petition for rehearing to the extent of making the following two revisions to our original opinion. First, we replace the final paragraph of Part III.A.2, *see id.* at 1050, with the following:

> In sum, because the reference to § 107(d) in § 181(a)(1) includes the designation of an area as nonattainment for ozone under a revised ozone NAAQS, that is, under § 107(d)(1), the EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2.

Second, we replace the second sentence of the Conclusion, *see id.* at 1057, with the following:

> We do not vacate the new ozone standards because the parties have not shown that the standard is likely to engender costly compliance activities in light of our determination that it can be enforced only in conformity with Subpart 2.

As with the $PM_{2.5}$ NAAQS, our decision not to vacate the ozone NAAQS "is without prejudice to the ability of any party to apply for vacatur in the future, should circumstances develop in which the presence of this standard threatens a more imminent harm." *American Trucking Ass'ns, Inc. v. EPA*, No. 97-1440 (D.C. Cir. Jun. 18, 1999).

III. Beneficent Health Effects

The arguments in the EPA's petition for rehearing give us no reason to doubt the correctness of our conclusion that "all identifiable effects," as used in CAA § 108(a)(2), "on its face . . . include[s] beneficent effects." 175 F.3d at 1051. Nor do those arguments warrant consideration in a published opinion. We express no opinion, of course, upon the effect, if any, that studies showing the beneficial effects of tropospheric ozone, *see id.* at 1052, might have upon any ozone standard the EPA may promulgate on remand.

IV. Conclusion

For the above reasons, the EPA's petition for rehearing is

Granted in part and denied in part.

TATEL, *Circuit Judge*, concurring in part and dissenting in part:

I concur in the partial grant of rehearing with respect to enforcement of the revised ozone standard because, as modified, the opinion now leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with Subpart 2's classifications and attainment dates. While I too think that we have jurisdiction to decide the enforcement issue, I write separately because I do not entirely agree with the rationale of the modified panel opinion.

The panel understood EPA's original position to be that, although Subpart 2 limited the Agency's enforcement of the pre-existing one-hour 0.12 ppm ozone NAAQS, it "has no effect upon the EPA's authority to enforce a revised primary ozone NAAQS." *American Trucking Associations v. EPA*, 175 F.3d 1027, 1048 ("*ATA*"). That interpretation, the panel held, not only conflicted with section 7511(a)(1)'s text and legislative history, *see id.*, 175 F.3d at 1048-49, but by leaving the Agency free to "requir[e] areas to comply either more quickly or with a more stringent ozone NAAQS," it defied Congress's clear intent to "extend[ ] the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS." *Id.* at 1049.

Having rejected the Agency's interpretation, the panel went on to agree with petitioners that Subpart 2 embodies "a

comprehensive enforcement scheme" that "specifically provides classifications and dates for *all* areas designated nonattainment under *any* ozone NAAQS." *Id.* at 1049, 1048 (emphasis added). This holding meant that areas not covered by Table 1 in Subpart 2—i.e. those with one-hour ozone design values below 0.121 ppm—were completely exempt from any ozone regulation whatsoever. Although the panel acknowledged that EPA must continue to revise the NAAQS, *see id.* at 1047, it concluded that the revised standard "cannot be enforced by virtue of [Subpart 2]." *Id.* at 1057.

After reading EPA's petition for rehearing and the various responses, I no longer believe that it was "the unambiguously expressed intent of Congress" to command EPA to revise the ozone standards, while denying it the power to enforce them. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842. Table 1 specifically provides classifications and attainment dates for some areas, but as EPA points out, "it establishes *no* attainment dates or classifications for nonattainment areas with 'design values' lower than 0.121 ppm." EPA Pet. Reh'g at 22-23. As the Agency argues, it is thus difficult to see how Subpart 2 can "specifically provide []" attainment dates for areas that are designated nonattainment under the new standard but are not covered by Table 1. *See id.* at 22-24. This gap in Table 1 makes it at least ambiguous whether Subpart 2 "*specifically* provide[s]" classifications and attainment dates for *all* areas exceeding the revised 0.08 ppm ozone NAAQS.

EPA also points out that treating Subpart 2 as the exclusive enforcement scheme for all areas leads to "irrational and contradictory consequences." *Id.* at 23. Subpart 2 provides that "[e]ach area designated

nonattainment for ozone pursuant to section 7407(d) of this title shall be classified . . . under table 1, by operation of law. . . ." 42 U.S.C. § 7511(a)(1). Even if the panel is correct that the reference to section 7407(d) includes designations under a revised NAAQS pursuant to section 7407(d)(1)(A), *see* Slip Op. on Reh'g at 6-7, the fact remains that the only "nonattainment areas for which classifications [and attainment dates] are specifically provided under" Table 1 are those having one-hour ozone design values of 0.121 ppm or greater. *ATA*, 175 F.3d at 1048 (quoting 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D)). Classifying other areas "under table 1, by operation of law" is thus impossible or, at the very least, not "unambiguously" "specifically provided for." And although, as the panel noted, "a title [of a statute or section] cannot be allowed to create an ambiguity in the first place," *id.* at 1050, the ambiguity in this statute—Can section 7511(a)(1) be applied literally to areas that have attained the old standard but fail to meet the new one?—appears in the text of Subpart 2 itself.

Moreover, EPA has offered a plausible interpretation of the statute that reasonably reconciles the provisions of Subparts 1 and 2. In its Petition for Rehearing, the Agency states that "Subpart 2 addresses continued nonattainment for the primary one-hour ozone standard," EPA Pet. Reh'g at 20, while Subpart 1 provides implementation authority for the new ozone standard in areas that have already attained the old one, *see id.* at 20-22. The Agency articulated this same reading of the statute in its original brief, stating that "consistent with Congress' intent, EPA interpreted the Subpart 2 provisions to remain in place for areas not attaining the one-hour standard, and concluded the one-hour standard should continue to apply until EPA determines that an area

attains that standard, thus facilitating continued implementation of the relevant Subpart 2 measures." EPA Ozone Brief at 72. The final rulemaking—the Agency action we are reviewing here—is even clearer about the relationship between Subparts 1 and 2:

> [A]t the time of the proposal of the new O_3 standard, EPA had proposed an interpretation of the Act in the proposed Interim Implementation Policy (61 FR 65764, December 13, 1996) under which the provisions of subpart 2 of part D of Title I of the Act would not apply to existing O_3 nonattainment areas once a new O_3 standard becomes effective.
>
> In light of comments received regarding the interpretation proposed in the Interim Implementation Policy, EPA has reconsidered that interpretation and now believes that the Act should be interpreted such that the provisions of subpart 2 continue to apply to O_3 nonattainment areas for purposes of achieving attainment of the current 1-hour standard. As a consequence, the provisions of subpart 2, which govern implementation of the 1-hour O_3 standard in O_3 nonattainment areas, will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. Once an area attains that standard, however, the purpose of the provisions of subpart 2 will have been achieved and those provisions will no longer apply. However, the provisions of subpart 1 of part D of Title I of the Act would apply to the implementation of the new 8-hour O_3 standards.
>
> To facilitate the implementation of those provisions and to ensure a smooth transition to the implementation of the new 8-hour standard, the 1-hour standard should

> remain applicable to areas that are not attaining the 1-hour standard. Therefore, the 1-hour standard will remain applicable to an area until EPA determines that it has attained the 1-hour standard, at which point the 1-hour standard will no longer apply to that area.

62 Fed. Reg. 38,873 (1997), *cited in* EPA Ozone Brief at 72. *See also* 40 C.F.R. § 50.9(b) (continuing to apply the one-hour 0.12 ppm standard until it is attained).

To be sure, EPA's original brief did seem to advance the position the panel rejected—that in enforcing the new ozone NAAQS, the Agency is free to disregard altogether Subpart 2's timetable. *See* EPA Ozone Brief at 69-71. Given the clarity of the final rule, however, I no longer believe that EPA actually intended to argue that it could subvert Subpart 2's schedule in enforcing the new ozone NAAQS. When EPA's lawyers said in the original brief that Subpart 2 is inapplicable to nonattainment areas under the new ozone standard, I assume they must have meant that even under the new standard, Subpart 2 continues to apply to areas covered by Table 1—not that Subpart 2 no longer applies at all. Viewed this way, EPA's original brief and its petition for rehearing are perfectly consistent with the final rule: all three interpret the Act to mean that Subpart 2 still applies to an area until it attains the one-hour 0.12 ppm standard. This interpretation puts to rest the panel's concern that Subpart 2's attainment schedule "would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments." *ATA*, 175 F.3d at 1050.

The Agency's petition also explains the practical consequences of its interpretation of Subpart 2. Although EPA may not enforce a stricter ozone standard in Los

Angeles earlier than the year 2012, *see id.* at 1049, the Agency need not wait for Los Angeles to achieve the old standard before requiring the rest of the country to move toward cleaner air. *Cf.* EPA Pet. Reh'g at 25 (suggesting that Los Angeles "is the only area of the nation" where compliance with the 0.08 ppm NAAQS under Subpart 1 could possibly be required at the same time as compliance with the 0.12 ppm NAAQS under Subpart 2). In other words, Table 1 functions as a safe harbor for areas like Los Angeles whose ozone levels exceed 0.121 ppm.

To sum up, the panel rejected what it was led to believe was EPA's view that Subpart 2 applied only to nonattainment areas under the old standard but no longer applies at all under the new standard. The panel held instead that Subpart 2 applies to *all* nonattainment areas under *any* standard, foreclosing implementation of a new standard in any area not covered by Table 1. EPA has now clarified its interpretation of the Act. A middle ground originally articulated in its final rulemaking, the Agency's position harmonizes its general enforcement authority under Subpart 1 with the specific provisions of Subpart 2. Subpart 2 continues to govern those areas covered by Table 1, just as it did under the old NAAQS, but in areas that have attained the old standard, nothing precludes enforcement of the new standard under Subpart 1.

I would have granted rehearing and held that the Agency's position represents a reasonable interpretation of an ambiguous statute. *See Chevron*, 467 U.S. at 844 (upholding EPA's construction of NAAQS attainment provisions of the Clean Air Act, stating that "a court may not substitute its own construction of a statutory provision for a reasonable

interpretation made by the administrator of an agency."). I nonetheless concur in the judgment because the revised opinion's statement that "the EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2" leaves open the possibility that the new ozone standard can be implemented in areas that have attained the old standard.

For the reasons set forth in my statement dissenting from the denial of rehearing *en banc*, I respectfully dissent from the denial of rehearing as to Part I of the panel opinion ("Delegation").

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1546, 97-1548, 97-1551 to 97-1553,
97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567,
97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579,
97-1582, 97-1585 to 97-1588, 97-1592,
97-1594, 97-1596 to 97-1598

No. 97-1441

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1502, 97-1505, 97-1508 to 97-1510,
97-1512 to 97-1514, 97- 1518, 97-1519, 97-1526, 97-1531,
97-1539, 97-1566, 97-1568, 97-1570, 97-1572, 97-1575,
97-1584, 97-1589, 97-1591, 97-1595, 97-1619

[Filed October 29, 1999]

On Respondent EPA's Suggestion for Rehearing *En Banc*

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, *Circuit Judges*.

Circuit Judges WALD and HENDERSON did not participate in this matter.

Chief Judge EDWARDS and *Circuit Judges* SILBERMAN, ROGERS, TATEL, and GARLAND would grant the suggestion.

A statement of *Circuit Judge* SILBERMAN dissenting from the denial of rehearing *en banc* is attached.

A statement of *Circuit Judge* TATEL dissenting from the denial of rehearing *en banc*, in which *Chief Judge* EDWARDS and *Circuit Judge* GARLAND join, is attached.

PER CURIAM

Respondent EPA's Suggestion for Rehearing *En Banc* and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

SILBERMAN, *Circuit Judge*, dissenting from the denial of rehearing *en banc*:

The panel's reliance on the nondelegation doctrine to reject EPA's interpretation of section 109 of the Clean Air Act is rather ingenious, but I regret that it seems to me to be fundamentally unsound. I do not think that doctrine can be employed to force an agency to narrow a broad legislative delegation from Congress.

The doctrine, as Judge Tatel in dissent pointed out, *American Trucking Associations v. EPA*, 175 F.3d 1027, 1057-58 (D.C. Cir. 1999) ("*ATA*") (Tatel, J., dissenting in

part), is at this stage of constitutional "evolution" not in particularly robust health. Justice Rehnquist heroically attempted to inject vitality into the doctrine in his powerful concurrence in the *Benzene* case, *see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980). But, sad to say, his view is not shared by a majority of the Court which has acknowledged only a theoretical limitation on the scope of congressional delegations to the executive branch. *See Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?").

To be sure, the plurality in the *Benzene* case ostensibly relied on the doctrine to support its interpretation of the Occupational Safety and Health Act. *See Benzene*, 448 U.S. at 645-46. But a careful reading of the plurality opinion (not, of course, an opinion of the Court, which would bind us) reveals that the doctrine was only a makeweight, tossed into the analysis, in light of Justice Rehnquist's concurrence, to help justify the result. The plurality, disturbed at the seemingly draconian impact of the Secretary of Labor's standard as applied to several industries, analytically conflated the scope of the Secretary's discretion—the legitimate concern of the nondelegation doctrine—with the regulatory consequences of his interpretation of the statute. *Id.* at 645. The latter concern is not really germane to the doctrine; indeed, the Secretary was actually claiming he had *less* discretion than the plurality thought he had. Accordingly, the *Benzene* plurality opinion gives only lip service to the nondelegation doctrine; the boundaries limiting the scope of congressional delegation to the executive branch remain only

dimly perceivable. I agree with Judge Tatel that the terminology of this section of the Clean Air Act does not come so close to those boundaries to raise a serious constitutional problem.

If it did, and we were faced with two conflicting interpretations of the statute—both plausible—I have no doubt that a constitutionally dubious agency interpretation could be rejected even in a post-*Chevron* era. The majority questions that proposition—and confuses the issue—by stating that "the approach of the *Benzene* case . . . has given way to the approach of *Chevron*." Slip Op. on Reh'g at 4. The Supreme Court's opinion in *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), is to the contrary. *See also infra* at 1 (Tatel, J., dissenting from denial of rehearing *en banc*) (citing *Mistretta*, 488 U.S. at 373 n.7). In other words, the constitutional avoidance canon trumps *Chevron* deference. But that principle is not relevant to this case. Even assuming the statute was problematic, the panel was not faced with two competing constructions, one of which might be thought to avoid constitutional difficulty. Indeed, the panel concluded that there are no intelligible principles "apparent from the statute" that brought EPA's discretion within constitutionally acceptable limits. *ATA*, 175 F.3d at 1034. If the panel believed that was so, it should have held the statute unconstitutional. Instead the panel, purporting to rely on *Chevron*, remanded to EPA directing that agency to come up with an artificially narrow interpretation with various suggestions offered by the panel to accomplish that end.[1] *Id.*

[1] Like the plurality opinion in *Benzene*, these suggestions seem more directed to encouraging wiser policy choices than interpreting the statute at issue.

at 1038-40. By so doing, I believe the panel undermines the purpose of the nondelegation doctrine.

That purpose is, of course, to ensure that *Congress* makes the crucial policy choices that are carried into law. The ability to make those policy choices (even if only at a broad level of generality) is what is meant by legislative power. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."). It hardly serves—indeed, it contravenes—that purpose to demand that EPA in effect draft a different, narrower version of the Clean Air Act.[2] Under that view Congress would be able to delegate almost limitless policymaking authority to an agency, so long as the *agency* provides and consistently applies an "intelligible principle."[3]

That is not to say that EPA is totally free to exercise its authority at any point on the discretionary continuum that Congress delegated to it in the Clean Air Act. The Administrative Procedure Act's arbitrary and capricious

[2] The panel acknowledges this purpose but, relying on an old district court opinion as primary support, claims that its approach preserves two other rationales of the doctrine, limiting the ability of agencies to exercise delegated authority arbitrarily and providing meaningful standards for judicial review. *See ATA*, 175 F.3d at 1038 (citing *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758-59 (D.D.C. 1971)). But these "purposes" are obviously derivative of the doctrine's primary function of ensuring that *Congress* makes key policy decisions. It is, after all, only this so-called "third" purpose, *see id.*, that has any connection to the doctrine's constitutional source.

[3] It is true that we used a similar approach in *Industrial Union, UAW v. OSHA ("Lockout-Tagout I")*, 938 F.2d 1310 (D.C. Cir. 1991). Although one could distinguish that case, I think it rests on a similarly flawed analysis of the doctrine.

standard also limits the agency's actions. As we have observed, the broader the substantive statutory delegation the more likely that the agency's policy choices will be confined by the APA, rather than the substantive statute. *See National Ass'n of Regulatory Utility Com'rs v. ICC*, 41 F.3d 721, 727 (D.C. Cir. 1994) ("Whether an agency action is to be judged as reasonable, in accordance with the APA's general arbitrary and capricious standard, or whether it is to be examined as a permissible interpretation of the statute *vel non* depends, at least theoretically, on the scope of the specific congressional delegation implicated."). In that regard, I am quite uncertain whether EPA's regulatory choice meets that test. Judge Tatel's emphasis on the agency's extensive procedures does not appear to me to answer the question. It would not matter whether the agency "actually adhered to a disciplined decisionmaking process," *ATA*, 175 F.3d at 1059, if its final product was unreasonable. If we were to rehear the case, I would focus on that issue.

Doctrine aside, then, what is the practical difference between my approach and the panel's? The answer, I think, is that the panel engages—and by retaining jurisdiction promises to continue to engage, *see id.* at 1057—in a more searching review than the arbitrary and capricious standard would permit. By treating this case as a statutory interpretation question laden with constitutional implications the panel implicitly asserts a greater role for a reviewing court than is justified.

* * * *

I respectfully dissent from our denial of rehearing *en banc*.

TATEL, *Circuit Judge*, with whom EDWARDS, *Chief Judge*, and GARLAND, *Circuit Judge*, join, dissenting from the denial of rehearing *en banc*:

In explaining why they remain convinced that the Clean Air Act contains an unconstitutional delegation of legislative power, my colleagues merely repeat that EPA has failed to articulate a sufficiently limiting principle. *See* Slip Op. on Reh'g at 1-3. They then launch into a discussion of the proper remedy once a court encounters a problematic legislative delegation and conclude that "the approach of the *Benzene* case . . . has given way to the approach of *Chevron*." Slip Op. on Reh'g at 4. *But see supra* at 2-3 (Silberman, J., dissenting from the denial of rehearing *en banc*); *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional. *See, e.g.*, [the *Benzene* case.]").

The issues discussed by my colleagues have no relevance to the constitutional question we face. As I pointed out in my dissent, the Clean Air Act's requirement that EPA set air quality standards "requisite to protect the public health" with "an adequate margin of safety" based on criteria that "accurately reflect the latest scientific knowledge" is far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years. 42 U.S.C. § 7409(b)(1), § 7408(a)(2). *See, e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to the FCC to regulate broadcast licensing in the "public interest"); *American*

Trucking Associations, Inc. v. EPA, 175 F.3d 1027, 1057-58 (D.C. Cir. 1999) (Tatel, J., dissenting in part) (collecting cases). In language particularly relevant to the highly technical and scientific process of setting national ambient air quality standards, the Supreme Court in *Mistretta* said this about the nondelegation doctrine: "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. at 372. Such extensive and unambiguous Supreme Court precedent is more than enough to sustain the Clean Air Act's delegation of authority to the EPA. For purposes of constitutional analysis, we thus have no need to require that EPA state "a far more determinate basis for decision" beyond the intelligible principle Congress provided in the Clean Air Act. *ATA*, 175 F.3d at 1037. Nor have we any reason to consider what remedies might be available were we faced with a statute that failed to meet constitutional standards. Unless petitioners can persuade the Supreme Court to return to the days of *Schechter Poultry*, this "inferior" court has no authority to demand anything more from either EPA or Congress.

Neither *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), nor the *Benzene* case, both heavily relied upon by petitioners in their opposition to the suggestion for rehearing *en banc*, supports the panel's opinion. No one in *American Lung* doubted the constitutionality of section 109's directive that EPA establish NAAQS "requisite to protect the public health." Applying the familiar arbitrary and capricious standard, we held only that the Agency, in setting the sulfur dioxide NAAQS, had failed adequately to explain its

application of section 109. *See American Lung*, 134 F.3d at 392. The *Benzene* plurality stated nothing more than that section 3(8) of the OSHA statute implicitly requires the Agency to make a threshold finding that a substance to be regulated causes "significant risks of harm." 448 U.S. at 641. In support of this inference, the plurality pointed to the statute's structure, context, and legislative history, *see id.* at 642-45, adding that a broader reading "might" amount to an unconstitutional delegation, *id.* at 646. The conclusion that Congress *may* constitutionally delegate authority to OSHA to regulate "significant" risks of harm hardly supports the panel's holding that Congress *may not* constitutionally delegate authority to EPA to issue NAAQS "requisite" to protect the public health—a standard more restrictive than the one the Supreme Court derived and approved in the *Benzene* case.

The panel's nondelegation holding plainly "involves a question of exceptional importance" warranting *en banc* review. Fed. R. App. P. 35(a). Not only did the panel depart from a half century of Supreme Court separation-of-powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by hundreds of millions of people. *See* H.R. REP. NO. 101-490, pt. 1, at 144-45 (1990).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1546, 97-1548, 97-1551 to 97-1553,
97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567,
97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579,
97-1582, 97-1585 to 97-1588, 97-1592,
97-1594, 97-1596 to 97-1598

No. 97-1441

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1502, 97-1505, 97-1508 to 97-1510,
97-1512 to 97-1514, 97- 1518, 97-1519, 97-1526, 97-1531,
97-1539, 97-1566, 97-1568, 97-1570, 97-1572, 97-1575,
97-1584, 97-1589, 97-1591, 97-1595, 97-1619

[Filed October 29, 1999]

BEFORE: EDWARDS, *Chief Judge*; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

ORDER

PER CURIAM

Upon consideration of the petitions for rehearing *en banc* of intervenors-respondents New Jersey and Massachusetts in Nos. 97-1440 and 97-1441, Citizens for Balanced Transportation, et al. in No. 97-1440 and the American Lung Association in Nos. 97-1440 and 97-1441, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Circuit Judges WALD and HENDERSON did not participate in this matter.

APPENDIX C

Relevant Regulatory Provisions

National Ambient Air Quality Standards for Particulate Matter

The final rule revising the National Ambient Air Quality Standards for Particulate Matter provides:

Therefore, 40 CFR Chapter I is amended as follows:

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

* * *

4. Section 50.7 is added to read as follows:

§ 50.7 National primary and secondary ambient air quality standards for particulate matter.

(a) The national primary and secondary ambient air quality standards for particulate matter are:

(1) 15.0 micrograms per cubic meter ($\mu g/m^3$) annual arithmetic mean concentration, and 65 $\mu g/m^3$ 24-hour average concentration measured in the ambient air as $PM_{2.5}$ (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either.

(i) A reference method based on Appendix L of this part and designated in accordance with part 53 of this chapter; or

(ii) An equivalent method designated in accordance with part 53 of this chapter.

(2) 50 micrograms per cubic meter ($\mu g/m^3$) annual arithmetic mean concentration, and 150 $\mu g/m^3$ 24-hour average concentration measured in the ambient air as PM_{10} (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) by either:

(i) A reference method based on Appendix M of this part and designated in accordance with part 53 of this chapter; or

(ii) An equivalent method designated in accordance with part 53 of this chapter.

(b) The annual primary and secondary $PM_{2.5}$ standards are met with the annual arithmetic mean concentration, as determined in accordance with Appendix N of this part, is less than or equal to 15.0 micrograms per cubic meter.

(c) The 24-hour primary and secondary $PM_{2.5}$ standards are met when the 98th percentile 24-hour concentration, as determined in accordance with Appendix N of this part, is less than or equal to 65 micrograms per cubic meter.

(d) The annual primary and secondary PM_{10} standards are met when the annual arithmetic mean concentration, as determined in accordance with Appendix N of this part, is less than or equal to 50 micrograms per cubic meter.

(e) The 24-hour primary and secondary PM_{10} standards are met when the 99th percentile 24-hour concentration, as determined in accordance with Appendix N of this part, is less than or equal to 150 micrograms per cubic meter.

* * *

62 Fed. Reg. 38652, 38711 (July 18, 1997).

National Ambient Air Quality Standards for Ozone

The final rule revising the National Ambient Air Quality Standards for Ozone provides:

Therefore, for the reasons set forth in the preamble, title 40, chapter I, part 50 of the Code of Federal Regulations is amended as follows:

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

* * *

2. Section 50.9 is revised to read as follows:

§ 50.9 National 1-hour primary and secondary ambient air quality standards for ozone.

(a) The level of the national 1-hour primary and secondary ambient air quality standards for ozone measured by a reference method based on Appendix D to this part and designated in accordance with part 53 of this chapter, is 0.12 parts per million (235 $\mu g/m^3$): The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million (235 $\mu g/m^3$) is equal to or less than 1, as determined by Appendix H to this part.

(b) The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has

air quality meeting the 1-hour standard. Area designations are codified in 40 CFR part 81.

3. Section 50.10 is added to read as follows:

§ 50.10 National 8-hour primary and secondary ambient air quality standards for ozone.

(a) The level of the national 8-hour primary and secondary ambient air quality standards for ozone, measured by a reference method based on Appendix D to this part and designated in accordance with part 53 of this chapter, is 0.08 parts per million (ppm), daily maximum 8-hour average.

(b) The 8-hour primary and secondary ozone ambient air quality standards are met at an ambient air quality monitoring site when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm, as determined in accordance with Appendix I to this part.

* * *

62 Fed. Reg. 38856, 38894 (July 18, 1997).

1-Hour Ozone Standard: Reinstatement

* * *

2. Section 50.9 is revised to read as follows:

§ 50.9 National 1-hour primary and secondary ambient air quality standards for ozone.

* * *

(b) The 1-hour standards set forth in this section will remain applicable to all areas notwithstanding the promulgation of 8-hour ozone standards under section 50.10. In addition, after the 8-hour standard has become fully enforceable under part D of title I of the CAA and subject to no further legal challenge, the 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations and classifications with respect to the 1-hour standards are codified in 40 CFR part 81.

* * *

1-Hour Ozone Standard: Reinstatement: Final Rule (visited July 19, 2000) <http://www.epa.gov/ttn/oarpg/t1/fr_notices/rein18ss8.pdf>.

APPENDIX D

Relevant Statutory Provisions

Excerpt from Section 101 of the Clean Air Act

§ 7401. Congressional findings and declaration of purpose

* * *

(b) Declaration

The purposes of this subchapter are–

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

* * *

* * *

Excerpt from Section 108 of the Clean Air Act

§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970,

publish, and shall from time to time thereafter revise, a list which includes each air pollutant–

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on–

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1) of this section, which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the

Administrator information related to that required by paragraph (1).

(c) Review, modification, and reissuance of criteria or information

The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

* * *

Excerpt from Section 109 of the Clean Air Act

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator–

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality

standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

* * *

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) No later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

* * *

Excerpt from The Transportation Equity Act for the 21st Century

Title VI--Ozone And Particulate Matter Standards

§ 6101. Findings And Purpose

(a) The Congress finds that--

(1) there is a lack of air quality monitoring data for fine particle levels, measured as PM2.5, in the United States and the States should receive full funding for the monitoring efforts;

(2) such data would provide a basis for designating areas as attainment or nonattainment for any PM2.5 national ambient air quality standards pursuant to the standards promulgated in July 1997;

(3) the President of the United States directed the Administrator of the Environmental Protection Agency (referred to in this title as the "Administrator") in a memorandum dated July 16, 1997, to complete the next periodic review of the particulate matter national ambient air quality standards by July 2002 in order to determine "whether to revise or maintain the standards";

(4) the Administrator has stated that 3 years of air quality monitoring data for fine particle levels, measured as PM2.5 and performed in accordance with any applicable Federal reference methods, is appropriate for designating areas as attainment or nonattainment pursuant to the July 1997 promulgated standards; and

(5) the Administrator has acknowledged that in drawing boundaries for attainment and nonattainment areas for the July 1997 ozone national air quality standards, Governors would benefit from considering implementation guidance from EPA on drawing area boundaries.

(b) The purposes of this title are--

(1) to ensure that 3 years of air quality monitoring data regarding fine particle levels are gathered for use in the determination of area attainment or nonattainment designations respecting any PM2.5 national ambient air quality standards;

(2) to ensure that the Governors have adequate time to consider implementation guidance from EPA on drawing area boundaries prior to submitting area designations respecting the July 1997 ozone national ambient air quality standards;

(3) to ensure that the schedule for implementation of the July 1997 revisions of the ambient air quality standards for particulate matter and the schedule for the Environmental Protection Agency's visibility regulations related to regional haze are consistent with the timetable for implementation of such particulate matter standards as set forth in the President's Implementation Memorandum dated July 16, 1997.

§ 6102. Particulate Matter Monitoring Program.

(a) Through grants under section 103 of the Clean Air Act the Administrator of the Environmental Protection Agency shall use appropriated funds no later than fiscal year 2000 to fund 100 percent of the cost of the establishment, purchase, operation and maintenance of a PM2.5 monitoring network necessary to implement the national ambient air quality standards for PM2.5 under section 109 of the Clean Air Act. This implementation shall not result in a diversion or reprogramming of funds from other Federal, State or local Clean Air Act activities. Any funds previously diverted or reprogrammed from section 105 Clean Air Act grants for PM2.5 monitors must be restored to State or local air programs in fiscal year 1999.

(b) EPA and the States, consistent with their respective authorities under the Clean Air Act, shall ensure that the national network (designated in subsection (a)) which consists of the PM2.5 monitors necessary to implement the national ambient air quality standards is established by December 31, 1999.

(c)(1) The Governors shall be required to submit designations referred to in section 107(d)(1) of the Clean Air Act for each

area following promulgation of the July 1997 PM2.5 national ambient air quality standard within 1 year after receipt of 3 years of air quality monitoring data performed in accordance with any applicable Federal reference methods for the relevant areas. Only data from the monitoring network designated in subsection (a) and other Federal reference method PM2.5 monitors shall be considered for such designations. Nothing in the previous sentence shall be construed as affecting the Governor's authority to designate an area initially as nonattainment, and the Administrator's authority to promulgate the designation of an area as nonattainment, under section 107(d)(1) of the Clean Air Act, based on its contribution to ambient air quality in a nearby nonattainment area.

(2) For any area designated as nonattainment for the July 1997 PM2.5 national ambient air quality standard in accordance with the schedule set forth in this section, notwithstanding the time limit prescribed in paragraph (2) of section 169B(e) of the Clean Air Act, the Administrator shall require State implementation plan revisions referred to in such paragraph (2) to be submitted at the same time as State implementation plan revisions referred to in section 172 of the Clean Air Act implementing the revised national ambient air quality standard for fine particulate matter are required to be submitted. For any area designated as attainment or unclassifiable for such standard, the Administrator shall require the State implementation plan revisions referred to in such paragraph (2) to be submitted 1 year after the area has been so designated. The preceding provisions of this paragraph shall not preclude the implementation of the agreements and recommendations set forth in the Grand

Canyon Visibility Transport Commission Report dated June 1996.

(d) The Administrator shall promulgate the designations referred to in section 107(d)(1) of the Clean Air Act for each area following promulgation of the July 1997 PM2.5 national ambient air quality standard by the earlier of 1 year after the initial designations required under subsection (c)(1) are required to be submitted or December 31, 2005.

(e) The Administrator shall conduct a field study of the ability of the PM2.5 Federal Reference Method to differentiate those particles that are larger than 2.5 micrograms in diameter. This study shall be completed and provided to the Committee on Commerce of the House of Representatives and the Committee on Environment and Public Works of the United States Senate no later than 2 years from the date of enactment of this Act.

Supreme Court, U.S.
FILED
JUL 21 2000
CLERK

(13)

No. 99-1426

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Cross-Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF OF STATES OF OHIO, MICHIGAN AND WEST VIRGINIA IN SUPPORT OF CROSS-PETITIONERS

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting national air quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

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INTRODUCTION

The States of Ohio, Michigan and West Virginia ("Supporting States"), along with a number of other parties, challenged the 1997 revisions to the national ambient air quality standards for ozone and particulate matter issued under section 109 of the Clean Air Act by the Environmental Protection Agency ("EPA"). The District of Columbia Circuit agreed with the challengers that EPA had not articulated an "intelligible principle" for its revisions, and remanded the case to the agency to do so. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034-40 (D.C. Cir. 1999). However, the lower court, based on flawed precedent in the Circuit, also held that the Administrator of EPA is unable to consider any factor other than direct public health effects when setting or revising a standard under section 109. *Id.* at 1040-41. The Supporting States opposed EPA's petition for certiorari (No. 99-1257)[1], and supported the conditional cross-petition for certiorari of the American Trucking Associations (No. 99-1426), both of which were granted. The Supporting States submit this brief in support of cross-petitioners American Trucking Associations in Case No. 99-1426.

The regulation of public health and the environment is of manifest importance to the Supporting States. Long before federal legislation for air pollution controls, the Court acknowledged the States' responsibility to use their police powers to combat air pollution. "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960).

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[1] Ohio did not oppose certiorari on the first question presented in EPA's petition.

The Supporting States not only acknowledge, but embrace their responsibility to ensure public health and a safe environment. The Supporting States support efforts to promote a healthy environment and control air pollution, and therefore support the general goals and policies embodied in the Clean Air Act. The Supporting States also support the policy that consideration of public health is the primary consideration in setting and implementing air standards.

Congress's passage of the Clean Air Act, 42 U.S.C. 7401 *et seq.* ("CAA" or "the Act"), established a federal-state partnership for controlling air pollution, but confirmed that the States maintain primary responsibility for ensuring that clean air is achieved. Specifically, while EPA is responsible for setting and periodically revising air quality standards under sections 108 and 109, the States are responsible for adopting and enforcing an implementation plan that will assure that the standards are met under sections 107 and 110. CAA §§107, 108, 109, 110; 42 U.S.C. 7407, 7408, 7409, 7410.

EPA's decisions in this case, as well as the lower court's interpretation of section 109 of the Clean Air Act, upset this federal-state partnership. The District of Columbia Circuit, following a line of cases starting with *Lead Industries Ass'n v. U.S. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), held that EPA is bereft of discretion to consider the social, economic and environmental costs of a national ambient air quality standard under section 109; EPA can consider only the direct public health consequences of the particular pollutant. This interpretation can and does result in EPA setting unrealistic standards without considering numerous other factors, including the cost of implementation, direct and indirect effects on the economy such as higher costs for energy, and even the adverse health effects of a lower amount of the pollutant. In addition, under EPA's

interpretation, it can set a standard without a specific explanation of the standard's health benefits.

The States are then left to enforce an unjustified standard that may be impossible to implement. Such an unreasonable interpretation, when applied to a non-threshold pollutant, would effect an unconstitutional delegation of legislative power. *See* 175 F.3d at 1033.

The Supporting States therefore submit this brief to respectfully request that the Court affirmatively resolve the statutory issue by holding that EPA can and should consider costs as well as benefits when setting or revising a national ambient air quality standard under section 109. Not only will this interpretation avoid a potential constitutional issue, it also is a reasonable interpretation of both the language and the legislative history of the Clean Air Act. In addition, the EPA can only make sound regulatory decisions, which the States are expected to implement, when all factors regarding a proposed standard are taken into account.

SUMMARY OF ARGUMENT

Industry parties have devoted approximately 100 pages of detailed analysis of the issues in this case. The Supporting States do not reiterate all of that analysis here, but submit this brief to present arguments most relevant to the States. In addition, rather than repeat the factual account and background adequately covered elsewhere, the Supporting States hereby adopt the Statement of the Case of the American Trucking Associations' brief in this case.

The Supporting States submit this brief to make two main points. First, EPA's and the lower court's interpretation of section 109 creates significant problems for the States. EPA's failure to consider factors other than direct public health effects in setting an air quality standard may

require States to meet an unjustified standard that is impossible to implement using "enforceable" control measures.

Second, the language and legislative history of the Clean Air Act, as well as sound administrative judgment, indicate that an interpretation of section 109 of the Act that allows EPA to consider factors other than direct public health effects of a non-threshold pollutant is reasonable. EPA's interpretation is unreasonable because it prevents the consideration of non-public health factors, but allows EPA unfettered discretion to set the standard without an intelligible basis.

ARGUMENT

A. The Court Should Avoid Consideration of the Nondelegation Issue by Interpreting Section 109 to Allow EPA to Consider Factors Other Than Direct Public Health Effects When Setting A National Ambient Air Quality Standard.

This Court has made clear on numerous occasions that it is "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). In this case, a correct interpretation of section 109 will avoid altogether the need to reach the nondelegation issue raised by the lower court. The Supporting States therefore respectfully request that this Court affirmatively avoid the constitutional issue, affirm the lower court's finding that EPA has failed to articulate intelligible principles for selecting standards for

ozone and particulate matter, and allow EPA on remand to consider costs and other non-health factors in adopting those intelligible principles.

The District of Columbia Circuit Court of Appeals correctly found that EPA has failed to find an "intelligible principle" for selecting a standard for ozone and fine particulates. 175 F.3d at 1034. It therefore correctly remanded the revised standard to EPA "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038. However, in so doing, the court acted as if constrained by *Lead Industries* and its progeny to deny EPA the one tool that would most help in selecting an air pollution standard: the consideration of costs and other non-health factors.

Ozone and fine particulates are "non-threshold" pollutants; that is, there is no threshold amount, above which deleterious health effects are certain, and below which no health effects are known. As the lower court stated, "EPA regards ozone definitely, and [particulate matter] likely, as non-threshold pollutants, *i.e.* ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." 175 F.3d at 1034, citing Ozone Final Rule, 62 Fed. Reg. at 38863/3 (1997). *See also Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146, 1148 (D.C. Cir. 1987) ("*Vinyl Chloride*") (a "non-threshold" pollutant is one that "appears to create a risk to health at all non-zero levels of emission"). *Cf. Lead Industries*, 647 F.2d at 1137-41 (discussing various thresholds for lead exposure used to support the standard for lead). The court below also noted that "the only concentration[] for ozone . . . that is

utterly risk-free, in the sense of direct health impacts, is zero." 175 F.3d at 1034.[2]

In the absence of a health threshold for a pollutant such as ozone, it is not surprising that EPA has difficulty articulating an "intelligible principle" based on health alone for its ozone standard, as *any* presence of the pollutant is assumed to present some threat to health. Without the ability to consider some other factor, only one logical result is possible if section 109 is read to protect against any threat to health: EPA must set the standard for a non-threshold pollutant at zero.

However, rather than setting the standard at zero, EPA chooses to interpret section 109 to allow the Administrator essentially unbounded discretion to select any level of protection for a non-threshold pollutant, without articulating a principled reason for doing so. Although EPA states reasons for which it claims to have chosen the ozone standard, they consist of vague references to "the nature and severity" of health effects, "the size of the sensitive populations at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35, citing Ozone Final Rule, 62 Fed. Reg. at 38,883/2 (1997). These factors do not provide a principled method for drawing a line identifying a level of air quality that is "requisite" to protect the "public health," nor to determine "safety," so that an "adequate margin of safety" can be established. *Vinyl Chloride*, 824 F.2d at 1163-65.

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[2] Threshold pollutants are not directly at issue in this case; however the same arguments presented here with regard to non-threshold pollutants may be made to some extent for threshold pollutants. Although there may be a health-based threshold above which these pollutants pose a risk, and that threshold should be the primary factor in setting the standard, it is still a question whether the cost of abating a certain percentage of the pollutant is worth the risk reduction. *See* Breyer, *Breaking the Vicious Circle* 11-21 (Harvard University Press 1993).

The dilemma produced by *Lead Industries* and its progeny, and EPA's standardless assertion of authority is what led the D.C. Circuit to invoke the nondelegation doctrine, for if EPA does indeed have such boundless discretion, then Congress has delegated too much legislative authority to an executive agency. However, this Court is not bound by the *Lead Industries* line of cases. The correct interpretation of section 109 will permit EPA to establish principled reasons for the standards set for non-threshold pollutants, thus setting boundaries for EPA's discretion, and eliminating the nondelegation problem. Rather than considering the constitutional nondelegation doctrine, the Supporting States respectfully request that the Court reject the rationale of the *Lead Industries* line of cases, thereby permitting EPA to consider factors other than direct public health effects when setting or revising a standard for an air pollutant.

EPA's standardless assertion of authority creates serious problems between the federal government and the States. Despite EPA's alleged inability to consider factors other than direct public health effects, it is required to gather and issue to the States information on just such factors when setting the criteria on which the standards are based. The States are issued "information on air pollution control techniques," including "data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology." CAA §108(b); 42 U.S.C. 7408(b). In addition, the information must include data on "available technology and alternative methods of prevention and control of air pollution," as well as "alternative fuels, processes, and operating methods." CAA §108(b); 42 U.S.C. 7408(b).

After EPA has set the standard, each State is required to develop a state implementation plan, or SIP for that

pollutant. CAA §110; 42 U.S.C. 7410. Specifically, section 110 requires the States to adopt and submit to EPA a plan to implement, maintain and enforce air quality standards. CAA §110(a)(1); 42 U.S.C. 7410(a)(1). According to the Act, the plan is to "include enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter." CAA §110 (a)(2)(A); 42 U.S.C. 7410(a)(2)(A).

In practical terms, States implement federal standards by limiting emissions from "sources," *e.g.*, manufacturing plants, electric utilities, automobiles. A manufacturing plant, for example, may be forced to reduce emissions to meet State requirements by purchasing advanced technology pollution control equipment or reducing its hours of operation. An electric utility, for example, may be forced to reduce emissions by changing its fuel source to cleaner burning coal imported from outside the region. State officials may reduce automobile emissions by imposing emissions testing on car owners and forcing equipment upgrades for older models.

The emission reductions resulting from the combination of these individual control measures—imposed through permit requirements for plants or license requirements for car owners—create a State's overall strategy for implementing the federal standard. In creating this strategy and making the difficult policy choices among possible control measures, a State is presumably required to consider and use the information provided for it under section 108(b) on control techniques, costs of installation and operation, energy requirements, emission reduction benefits, and environmental impacts of the emission control technology. CAA §108(b) 42 U.S.C. 7408(b). In addition, this information is provided to the States early in the process,

presumably to allow them to participate in the federal rule-making process.

Under the federal government's interpretation, EPA could adopt a standard without considering any factor other than direct public health effects, and without requiring EPA to intelligibly explain the standard. At the same time, however, the States must create the overall scheme for meeting the standard by using "enforceable" control measures and taking technological feasibility, cost and all the other factors mentioned in section 108(b) into account.

If EPA's interpretation is correct, it is free to knowingly set a standard for a pollutant that is economically impossible for the States to implement, and yet is unsupported by an intelligible explanation of why EPA drew the line where it did. The States are left in an impossible position—required to attain the standard by a specific deadline, using "enforceable emission limitations and other control measures," and taking cost and technological feasibility into account, but without adequate public health justifications.

If and when EPA provides adequate public health justification and properly takes costs, technological feasibility and other factors into account when setting a national standard for a pollutant, the federal government can then articulate an intelligible principle by which the standard is set, and will be, in effect, taking responsibility for its own decisions. The effects of technological feasibility, cost and other factors, as well as the specific public health benefits of an air quality standard can be debated openly with EPA. And the standards, and the rationale behind them, will be properly reviewable under the standard articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).

This Court is not bound by *Lead Industries*. The Supporting States respectfully request that the Court resolve this case without reaching the nondelegation doctrine by correctly interpreting section 109 to allow and require EPA to consider costs and other factors besides direct public health effects in setting a standard for ozone and other non-threshold pollutants.

B. The Language and the Legislative History of Section 109, as well as Principles of Administrative Policy, Support the Consideration of Costs and Other Factors Besides Direct Public Health Effects in Setting a National Ambient Air Quality Standard.

When a court reviews a statutory interpretation asserted by an executive agency, the court must answer two questions. The first is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, . . ." *Chevron*, 467 U.S. at 842. If the statute is silent or ambiguous, the court must determine whether the construction given it by the administrative agency is "based on a permissible construction of the statute." *Id.* at 843. *Lead Industries* was wrongly decided because the most reasonable interpretation of the language of section 109 and related sections is that EPA has the authority to consider factors other than health when setting an air standard. And in addition to the language of the statute, the legislative history and general principles of administrative policy support the consideration of costs as well as benefits when setting an air quality standard.

1. Under section 109, "ambient air quality standards" are set, "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." CAA §109 (b)(1); 42 U.S.C.

7409(b)(1). The language of section 109, and particularly its use of the terms "criteria" and "margin of safety," indicates that EPA may consider factors other than public health in setting a standard under section 109.[3]

EPA is to set or revise a standard under section 109 based on "criteria" issued under section 108. EPA issues the "criteria" in the form of a document summarizing studies and other scientific information on the direct public health effects of a particular pollutant. Under section 108, the criteria "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, . . ." In addition, the criteria are to incorporate information on a non-exclusive list of factors, including other factors that might alter the effects of the pollutant on public health and the effect of other pollutants that might interact to cause adverse health effects. CAA §108(a)(2)(A)-(B); 42 U.S.C. 7408(a)(2)(A)-(B). The fact that the list in section 108(a)(2) is non-exclusive at least suggests that factors other than "effects on public health or welfare" may be considered when issuing "criteria" upon which to set or revise a standard.

But even more telling is the very next subsection, 108(b). Simultaneously with issuance of the criteria, EPA collects and issues to the States "information on air pollution control techniques." CAA §108(b)(1); 42 U.S.C. 7408(b)(1). EPA gathers the information in consultation with advisory committees and federal departments and agencies. CAA

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[3] For more extensive discussions of the language of section 109 and related sections, *see* Brief of American Trucking Associations Argument, part II A & B; *see also* Brief of Appalachian Power Company Argument, part II A & B.

§108(b)(1); 42 U.S.C. 7408(b)(1). The information includes data on a wide range of factors, including cost of installation and operation, energy requirements, emission reduction benefits, environmental impacts of the emission control technology, alternative fuel processes, and operating methods that will result in elimination or reduction of emissions. CAA §108(b)(1); 42 U.S.C. 7408(b)(1). Section 108(b)(2) also provides for the establishment of a standing consulting committee for each pollutant, to develop the information in section 108(b)(1). CAA §108(b)(2); 42 U.S.C. 7408(b)(2). It is unlikely that Congress intended for EPA to gather and issue information on factors other than direct public health effects to aid the States in implementing a standard, if they did not also intend for EPA itself to consider the information in setting the standard.

The use of the term "public health" suggests that factors other than medical effects are to be considered in setting a standard. *See* American Trucking Associations Brief, section II A. In addition, the use of the language "margin of safety" in section 109 strongly suggests that factors other than health are to be considered in setting a standard. The word "margin" implies that there is a line from which that margin is measured. When EPA sets a standard for a threshold pollutant, as it did in *Lead Industries*, that line may be supplied by the threshold itself. (Lead is, or was at the time of *Lead Industries*, considered a threshold pollutant.) But where a non-threshold pollutant such as ozone is under scrutiny, there is no principled way, using only direct public health effects, to determine such a line. A "margin" must be measured from something, and if health factors alone do not supply the line, then other factors must.

This point is explored in *Vinyl Chloride*. In *Vinyl Chloride*, the D.C. Circuit held that section 112, which requires EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the

public health, did not preclude a consideration of costs. *Vinyl Chloride*, 824 F.2d at 1163. *Vinyl Chloride* suggests that EPA must make an initial determination of what is "safe" based solely on "the risk to health." *Id.* at 1165 although this determination "does not require a finding that 'safe' means 'risk free,'" or free from uncertainty. *Id.* EPA is to determine what inferences can be drawn from available scientific data, and decide what risks are "acceptable." However, the court goes on to state that "by its nature the finding of risk is uncertain" and "at this point of the regulatory process . . . the Administrator may set the emission standard at the lowest level that is technologically feasible." *Id.* In other words, once "safe" is determined using direct public health effects, EPA may use technological feasibility (and presumably other factors) to provide the "margin of safety."

In addition to *Vinyl Chloride*, other cases hold that an agency can consider costs if not expressly precluded from doing so by statutory language. *See George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 622-23 (D.C. Cir. 1998)(nothing in text precludes EPA's consideration of effects of proposed rule on the price and supply of gasoline); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998)(FAA may consider costs, though not mentioned in the statute, in plan for "substantial restoration of the natural quiet"); *National Resources Defense Council v. U.S. EPA*, 937 F.2d 641, 645 (D.C. Cir. 1991)(EPA may use cost-benefit analysis in determining whether fugitive dust from coal mines is a "major" contributor to "significant deterioration" under sections 160 *et seq.*). As the D.C. Circuit observed recently, "These cases are unexceptional in their general view that *preclusion* of cost consideration requires a rather express congressional direction." *Michigan Dep't of Environmental Quality v.*

EPA, 2000 U.S. App. LEXIS 3209 at *36-40 (D.C. Cir. March 3, 2000) (*"NOx SIP call"*)(emphasis supplied).[4]

Lead Industries directly contradicts this point. *Lead Industries* held that where Congress did not expressly and specifically provide for consideration of cost or other factors, an agency may not consider them. 647 F.2d at 1148. *See also National Resources Defense Council v. U.S. EPA*, 902 F.2d 962, 972-73 (D.C. Cir. 1990)(EPA precluded from considering the health consequences of unemployment in setting particulate standard); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1184-85 (D.C. Cir. 1981)(EPA cannot consider attainability and cost justifications for ozone standards); *Vinyl Chloride*, 824 F.2d at 1158-59 (*dicta* that section 109 does "not allow consideration of technological or economic feasibility").

To be sure, the courts have correctly held that where statutory language exclusively articulates the factors relevant to an agency's decision, the agency may not base its decision on other, irrelevant factors. *See, e.g., Union Elec. Co. v. U.S. EPA*, 427 U.S. 246 (1976)(provision enumerating eight criteria for consideration did not authorize consideration of other criteria); *American Petroleum Inst. v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (goal of ethanol market protection may not be considered in promulgating regulations under section 211 because it could "possibly make air quality worse"); *Ethyl Corp. v. U.S. EPA*, 51 F.3d 1053 (D.C. Cir. 1995)(denial of waiver based on health considerations (rather than the statutorily-required criterion) found impermissible).

[4] The Supporting States were among those who challenged EPA's *NOx SIP call* rule. EPA's position in that case is wholly inconsistent with its position here; there, EPA inappropriately overemphasized costs almost to the exclusion of the impact on air quality in the determination of "significant contribution."

See also NOx SIP call, 2000 U.S. App. LEXIS 3209, *93 (Sentelle, J., dissenting).

But where, as here, there is no language articulating an exclusive list of relevant factors, and no language precluding the consideration of factors other than direct public health effects, the *Lead Industries* rationale makes little sense. The mandate in section 109(b), "an adequate margin of safety," is similar to "ample margin of safety," the language analyzed in *Vinyl Chloride*. The "adequate margin of safety" language permits EPA less scientific uncertainty than "ample margin of safety." *Environmental Defense Fund v. EPA*, 598 F.2d 62, 81 (D.C. Cir. 1978). Other than that, there is no principled reason to distinguish the "margin of safety" language in section 109(b) and in section 112.

Finally, section 109(d), under which EPA is to review and revise criteria and standards every five years, requires the establishment of an independent scientific review committee to review and recommend changes to the criteria and standards. CAA §109(d)(2)(A); 42 U.S.C. 7409(d)(2)(A). In addition to advising the Administrator of areas in which additional knowledge and research on public health effects is needed, the committee is to advise the Administrator of a large number of other factors. These factors include "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." CAA §109(d)(2)(C)(iv); 42 U.S.C. 7409(d)(2)(C)(iv). In other words, the committee is to investigate and report to the Administrator about public health and non-public health factors regarding the national air standards. Again, it is unlikely that Congress intended the independent review committee and the Administrator to investigate these factors, and yet not consider them when revising an air standard.

In short, there is no "express congressional direction" in the Clean Air Act as a whole, or in section 109 that precludes EPA from considering cost or other factors when setting or revising an air quality standard. On the contrary, a reasonable interpretation of the language of the Act as a whole, and section 109 itself, is that EPA is to gather and consider such information when revising an air quality standard. The Court should therefore hold that, properly analyzed under *Chevron* and other cases, section 109(b) allows EPA to consider costs as well as benefits in setting or revising a standard.

2. The legislative history of the Clean Air Act also includes indications that, while "criteria" deal exhaustively with the scientific information available on the direct public health effects of a particular pollutant, a "standard" should also take other, non-health factors into account. The general tenor of the debates certainly indicates a get-tough attitude towards air pollution, and clearly demonstrates that the Act was intended to be technology forcing. However, the history also suggests that economic and technological factors were not to be entirely ignored.

An exchange on this issue took place during 1970 Senate Public Works Subcommittee Hearings on Air Pollution. At one point in the discussion, Senator Muskie was discussing criteria and standards with Undersecretary of the Department of Health Education and Welfare Veneman:

> Muskie: The standard is something different from the criteria, isn't it?
>
> Veneman: The criteria are the basis upon which you establish the standard.

* * *

> Muskie: How does that differ from a criterion? What else is there of a standard? . . .
>
> Veneman: . . .As well as the health aspect, there are esthetic, economic and other aspects. You may want to take other things into consideration in your standards.

Senate Public Works Subcommittee on Air Pollution, 91st Cong. 160 (1970).

The history of the 1977 amendments also contains a pertinent comment in the Report by the Committee on Interstate and Foreign Commerce. The Committee listed a number of shortcomings in the existing standards, and then stated:

> The foregoing deficiencies in the [standards] are pervasive and not easily cured. Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should be set at zero or background levels. *Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical.*

Committee on Interstate and Foreign Commerce, *Report*, 127 (May 12, 1977)(emphasis supplied).

Moreover, Congress has provided more than mere suggestions, at least with regard to ozone. Congress has

already recognized that attainment of the 1-hour ozone standard was impossible or nearly so in some regions. In enacting Title I, Part D, Subpart 2, Congress has set up an alternative regime for managing ozone pollution, clearly recognizing that attainment of the standard originally set by EPA was not feasible given current technology. Comments of Senator Durenberger with regard to the 1990 amendments to the Act demonstrate this point:

> [T]he whole purpose of this bill is, wherever possible, to substitute, for artificial unascertainable standards of health or safety, technology standards that suit the economic progress of an industrial society.

Congressional Research Service of the Library of Congress for the Committee on Environment and Public Works, U.S. Senate, *A Legislative History of the Clean Air Act Amendments of 1990*, 5683 (1993). As Congress clearly took cost, technological feasibility and other factors into account when it passed Subpart 2 of the Clean Air Act, it is unreasonable to assume that Congress intends for EPA to ignore these factors when revising a standard for the same pollutant.[5]

3. Finally, sound administrative policy indicates that cost in its broadest sense is always a factor in making a decision about the environment and public health. "[C]an an agency sensibly decide whether a risk is significant without also examining the cost of eliminating it?" Stephen G. Breyer, Richard B. Steward, Cass R. Sunstein & Matthew L. Sitzer, *Administrative Law & Regulatory Policy* 65 (4th ed.

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[5] As will be argued at more length in the Supporting States' second brief, given the existence of Subpart 2, EPA cannot revise the ozone standard at all.

1999). As discussed above, the consideration of non-health factors is the only sensible way to establish an air quality standard for a non-threshold pollutant. A cost-benefit analysis means "only a systematic weighing of the pros and cons" of a particular standard. *International Union v. OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991). Public health factors are not ignored, and indeed should be the primary factor in determining a standard.

Some commentators have taken the view that environmental agencies, while claiming to make decisions based on science, are in reality largely cost and policy-driven. Wendy Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613 (Nov. 1995). Wagner espouses the view that environmental agencies have perpetuated a "science charade" in which they exaggerate the role of science in setting standards in order to avoid accountability for the underlying policy decisions.

Where, as here, the scientific support for a more stringent standard is thin, cost and other non-health factors are even more important in making a sound administrative decision. EPA's action in revising the ozone standard is unsupported by any reliable scientific evidence sufficiently demonstrating health benefits for the new standard. Instead, EPA admits that the new ozone standard is largely the result of a policy judgment. Reasons for the revised standard "were largely judgmental in nature . . . and may not be amenable to quantification in terms of what risk is 'acceptable,' or any other metric." 62 Fed. Reg. 38652, 38688 (1997).

EPA has not shown that the proposed ozone standard is "requisite to protect the public health" with "an adequate margin of safety." The Court has construed "safety" under the Clean Air Act as "a significant risk of harm." *Vinyl Chloride*, 824 F.2d at 1153 (quoting *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 642

(1980)). *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1063 (D.C. Cir. 1995) (EPA's departure from "significant risk of harm" to "reasonable basis for concern" standard criticized).

As mentioned above, the statutory mandate to provide an "adequate" margin of safety permits EPA to take into account somewhat less scientific uncertainty than under an "ample" margin of safety. *EDF*, 598 F.2d at 81. However, the margin of safety inquiry supposes a significant public health risk, and EPA has not demonstrated that the revised ozone standard is needed to avoid significant health risks.

EPA admits that the science supporting the change in the standard is uncertain. *See, e.g.*, 62 Fed. Reg. 38856, 38867 (1997) ("the Administrator and CASAC have recognized . . . that there are many uncertainties inherent in [risk] assessments and that the resulting ranges of quantitative risk estimates do not reflect all of the uncertainties associated with the numerous assumptions inherent in such analyses"). The dubious science relied on by EPA was criticized by many, including the State of Ohio. "It is not possible to make an informed change in the standard since there is no statistical basis upon which to distinguish the range of proposals." Ohio's Comments, Record No. IV-D-9934.

Without hard scientific facts showing a significant risk of harm, EPA must have revised the standard based on other factors as well. EPA admits that it selected the ozone standard based on "public health policy judgments in addition to determinations of a strictly scientific nature." 62 Fed. Reg. 38856, 38867 (1997). These vague "judgments" make it impossible to determine whether the standard provides an "adequate margin of safety."

With such uncertain health benefits for the new standard, the prudent course is to balance them against costs

and other factors. To be useful, however, estimates of costs and other impacts must be comprehensive and accurate. The Regulatory Impact Analysis ("RIA") that EPA prepared (but presumably did not consider in setting the ozone standard) grossly underestimates the cost of the standard. For instance, Ohio estimated that partial compliance with the standard *for the state* would cost $760 million, while the RIA estimated that partial compliance *for the entire nation* would cost $600 million. Ohio's Comments, Record No. IV-D-9934.[6]

In short, prudent administrative policy and plain common sense demand that EPA consider costs and other relevant factors when setting a new national ambient air quality standard, while keeping the public health as its primary goal. The Court should interpret section 109 to allow and require that consideration.

The language of the Clean Air Act, as well as the legislative history, point to the reasonable conclusion that the EPA is to consider factors other than direct public health effects when setting and revising a national ambient air quality standard. Under the first part of *Chevron*, therefore, a reviewing court must put the Congressional intent into effect. But even if the intent is unclear, sound administrative policy and plain logic render EPA's rationale for revision of the ozone and particulate standards "unintelligible." Under the second part of *Chevron*, a reviewing court must hold that EPA's rationale reflects an "impermissible construction of the statute."

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[6] For a more extensive discussion of the costs of the revised ozone standard, *see* Brief of Appalachian Power Company, *et al.*, Introduction, part II and Brief of American Trucking Associations, *et al.*, Introduction, part B 1.

CONCLUSION

For the foregoing reasons, the States of Ohio, Michigan and West Virginia respectfully request that the Court avoid the potential constitutional issue by reversing the decision of the court of appeals to the extent that it precludes EPA from considering factors other than direct public health effects of a pollutant when it sets or revises a national ambient air quality standard. In addition, the Supporting States respectfully request that the Court order the lower court to vacate the ozone and particulate matter standards, and remand this case to EPA for reconsideration of those standards.

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No. 99-1426

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals properly reaffirmed the longstanding principle that the Environmental Protection Agency is to set and revise National Ambient Air Quality Standards (NAAQS) based on consideration of the effects on public health and public welfare posed by a pollutant's presence in the ambient air, and not on consideration of the technological feasibility, cost, or other alleged effects of implementing measures to attain NAAQS.

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In the Supreme Court of the United States

No. 99-1426

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 175 F.3d 1027.[1] The opinion on petitions for rehearing and dissenting statements on denial of rehearing en banc (Pet. App. 70a-101a) are reported at 195 F.3d 4.

JURISDICTION

The decision of the court of appeals was entered on May 14, 1999. Petitions for rehearing were granted in part and denied in part on October 29, 1999. The federal government's petition for a writ of certiorari in No. 99-1257 was filed on January 27, 2000, and was granted on May 22, 2000. The conditional cross-petition of American Trucking Association, *et al.*, was filed on February 28, 2000, and was granted on May 30, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the petition appendix in *Browner* v. *American Trucking Ass'ns*, No. 99-1257.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of Sections 101, 108, 109, and 110 of the Clean Air Act, 42 U.S.C. 7401, 7408, 7409, 7410, are set forth at App., *infra*, 1a-8a. Other sections of the Clean Air Act are set forth at Pet. App. 105a-126a.

The EPA rules at issue in this case are set forth at Pet. App. 102a-104a.

STATEMENT

Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, requires EPA to establish and periodically revise primary National Ambient Air Quality Standards (NAAQS) "requisite to protect" public health with "an adequate margin of safety," and secondary NAAQS "requisite to protect" public welfare. EPA is to set NAAQS "based on" the "air quality criteria" that EPA must prepare under Section 108. 42 U.S.C. 7409(b). Section 108 of the Act further specifies that the air quality criteria for each pollutant subject to the NAAQS requirement must "accurately" reflect "the latest scientific knowledge" on the effects on public health and public welfare posed by "the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. 7408(a)(2).

In the thirty years since enactment of these provisions, EPA has consistently recognized that the plain language of Sections 108 and 109 requires the agency to set and revise NAAQS based solely on consideration of the effects of ambient air pollutants on public health and public welfare, and not on the feasibility or effects of measures designed to attain the NAAQS. In an unbroken line of cases beginning with *Lead Industries Ass'n* v. *EPA*, 647 F.2d 1130, 1148, cert. denied, 449 U.S. 1042 (1980), the District of Columbia Circuit has repeatedly, and "emphatically," affirmed this principle. *NRDC* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991); see Pet. App. 19a-21a; *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); see also *NRDC* v. *EPA*, 824 F.2d 1146, 1158-1159 (D.C. Cir. 1987) (en banc) (*Vinyl Chloride*) (Section 109 "on its face does not allow consideration of technological or economic feasibility").

In their cross-petition seeking review of this longstanding interpretation, American Trucking Associations, *et al.* (ATA) have asked this Court to overturn a principle on which three decades of federal and state air quality regulation have rested. ATA would have EPA expand the range of factors that it considers in setting the NAAQS. Under ATA's approach, EPA would not only consider the health and welfare effects associated with the presence of a criteria pollutant in the ambient air, but would be required additionally to consider the feasibility, costs, and other effects of measures to *remove* the pollutant from the air.

As we explain in the Argument section of this brief, ATA's construction of the Act is inconsistent with the statutory text, with the overall scheme of the NAAQS program, and with other indicia of congressional intent. But it is important to emphasize at the outset a point that ATA, other industry groups, and their amici largely ignore: The CAA provides for consideration of economic and technological feasibility, but at *later stages* of the regulatory process. One might suppose from their submissions that setting the NAAQS is the sole component of the CAA's detailed process for improving air quality or that economic and technological feasibility are never considered in any other step of the CAA's elaborate process. That is simply not so.

The NAAQS serve as air quality targets for certain "criteria" pollutants based on the aggregate concentration of each in the ambient air; but the NAAQS are not, themselves, directly enforceable against regulated entities that emit those pollutants. See Pet. App. 26a-31a. Rather, the States seek to achieve the NAAQS through state implementation

plans (SIPs), which impose enforceable emission limitations and other pollution controls. See CAA § 110, 42 U.S.C. 7410. Economic and technological feasibility are taken into account at *that* stage of the regulatory program, when the States determine, in concrete form, what pollution controls are appropriate. See *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 266-269 (1976).

As this Court has recognized, Congress provided "ample opportunity" for consideration of economic and technological feasibility at the implementation stage of the regulatory process. *Union Elec.*, 427 U.S. at 268. Moreover, if EPA or the States conclude at that later stage, when control alternatives receive detailed consideration, that they cannot accommodate the regulated community's concerns consistent with their statutory obligations, then the regulated community can—and regularly does—present its concerns to Congress. Congress has reserved to itself the responsibility for adjusting the CAA as necessary to accommodate concerns regarding societal costs, and Congress has taken legislative action when *it* has concluded that such action is warranted. See, *e.g.*, Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (imposing new requirements for nonattainment areas).

In our opening brief in No. 99-1257, we have provided the Court with a description of the CAA provisions governing the initial promulgation, revision, and implementation of NAAQS, Pet. Br. 2-8, as well as a summary of the extensive explanations for the Administrator's 1997 decisions to revise the NAAQS for particulate matter (PM) and ozone, *id.* at 8-15. We accordingly will provide here only a brief discussion of the statutory provisions put at issue by ATA's cross-petition. We will also clarify a few additional key points regarding the record basis for EPA's decisions to revise the PM and ozone NAAQS.

I. The Clean Air Act's NAAQS Provisions

Sections 108 and 109 of the CAA, which govern EPA's development of air quality criteria and NAAQS, were enacted in 1970. 84 Stat. 1678-1679.[2] Since then, the CAA has required EPA to set and periodically revise "primary" and "secondary" NAAQS for certain ubiquitous air pollutants, known as criteria pollutants. 42 U.S.C. 7409(a)(1) and (d)(1). EPA must set "primary" standards at levels that, "in the judgment of the Administrator," are "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. 7409(b)(1). EPA must set "secondary" standards at levels that are "requisite to protect the public welfare" from any "known or anticipated adverse effects." 42 U.S.C. 7409(b)(2).

Section 109 requires both primary and secondary NAAQS to be "based on * * * criteria" that EPA develops under Section 108. Under that Section, EPA must identify, and develop "air quality criteria" for, pollutants that are emitted from "numerous or diverse" sources and that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7408(a)(1). Section 108 specifies that the "air quality

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[2] Congress first addressed the problem of air pollution through the Air Pollution Control Act of 1955, ch. 360, 69 Stat. 322, which authorized the Secretary of Health, Education, and Welfare (HEW) to conduct research activities. Congress later expanded HEW's authority to include, among other things, compiling and publishing air quality criteria based on scientific studies, Clean Air Act of 1963, Pub. L. No. 88-206, § 3(c), 77 Stat. 395. Congress later directed States to develop regionally based ambient air quality standards and provided mechanisms for enforcement, Air Quality Act of 1967, Pub. L. No. 90-148, § 108(c), 81 Stat. 492-494. Congress substantially revised that program through the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, which provided for national ambient air quality standards and for state implementation. See 84 Stat. 1679. Congress continued to build on that program through the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, and the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. See text at pp. 21-25, *infra*.

criteria" shall reflect the effects on public health and public welfare associated with the "presence" of a criteria pollutant "in the ambient air":

> Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.

42 U.S.C. 7408(a)(2). The CAA then specifies three types of information—each of which falls within the general definition set forth above—that, "to the extent practicable," the criteria shall "include":

> (A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;
>
> (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and
>
> (C) any known or anticipated adverse effects on welfare.

42 U.S.C. 7408(a)(2)(A)-(C).

As we have previously explained in more detail (see 99-1257 Pet. Br. 5-8), the CAA sets out an elaborate process, resting on principles of federal-state cooperation, to ensure that the air throughout the Nation "attains" the NAAQS. Under the CAA, the primary mechanisms for implementing the NAAQS are the SIPs, which set forth the pollution control measures necessary to attain all NAAQS by statutorily required dates. The States are expressly authorized under Section 110 to consider the economic and technological feasibility of the pollution control measures they include in their

SIPs. *Union Elec.*, 427 U.S. at 256-269. As this Court has explained (*id.* at 266):

> Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires * * * and industries with particular economic or technological problems may seek special treatment in the plan itself.

In addition, EPA itself has responsibility under the Act for taking various actions to implement the NAAQS. Just as the States may consider economic and technological feasibility in developing their SIPs, the Act generally grants EPA discretion to consider those factors when it acts to implement the NAAQS it has promulgated. For example, under Section 183 ("Federal ozone measures"), EPA is to issue control techniques guidelines, taking cost into account. 42 U.S.C. 7511b(a) and (e)(1)(A). Similarly, under Section 202(i)(2)(A)(i), EPA is to determine whether additional regulations for light-duty trucks are required to attain or maintain the NAAQS and, if so, to promulgate cost-effective regulations. 42 U.S.C. 7521(i)(2)(A)(i).[3]

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[3] See also, *e.g.*, CAA § 211(k)(1), 42 U.S.C. 7545(k)(1) (requiring EPA to promulgate standards for reformulated gas to be used in nonattainment areas, taking cost into account); CAA § 211(h)(1), 42 U.S.C. 7545(h)(1) (requiring EPA to set standards for gasoline volatility in nonattainment areas, taking cost into account); CAA § 213(a)(3), 42 U.S.C. 7547(a)(3) (requiring EPA to determine whether emissions from nonroad engines contribute significantly to ozone concentrations in more than one nonattainment area and to promulgate appropriate nonroad regulations, considering costs); CAA § 202(a), 42 U.S.C. 7521(a) (authorizing EPA to set engine standards for pollutants that may "reasonably be anticipated to endanger public health or welfare," taking the cost of compliance into account).

II. The Particulate Matter and Ozone Rules

ATA's cross-petition presents a straightforward issue of statutory construction that may be resolved without consideration of the records in the underlying rulemaking proceedings. Nevertheless, we must briefly respond to the characterization of those rulemaking records by ATA and its supporters. Contrary to that portrayal, those records show an extensive body of newly available scientific information, in both the PM and ozone rulemakings, that called for revision of the existing standards to address a wide range of adverse health effects.

1. EPA's revised PM and ozone NAAQS address real and significant effects, not merely hypothetical risks. EPA was confronted with consistent and persuasive evidence, from study after study, that as PM levels rise the number of people who actually die or enter hospitals—especially due to cardiovascular and respiratory disease—rises correspondingly. 61 Fed. Reg. 65,641-65,643 (1996); 97-1440 CA App. (PM App.) 1375-1778, 1801-1845.[4] In addition to similar epidemiological evidence linking ozone to increased hospital admissions in real populations, the ozone record contains numerous clinical studies that demonstrate ozone's deleterious effects on the human respiratory system. 61 Fed. Reg. at 65,719-65,720. In those studies, researchers measured respiratory effects in human volunteers exposed to ozone under controlled laboratory conditions. 97-1441 CA App. (Ozone App.) 1461-1462.

[4] Indeed, the court of appeals considered and rejected ATA's assertion (see ATA Br. 13) that EPA should not have revised the PM standard because of uncertainty as to the biological mechanism by which PM may cause the health effects shown in more than 60 epidemiological studies. Pet. App. 55a-56a. The court found that the record "amply justifie[d] establishment of new fine particle standards." *Id.* at 56a. No party sought review of this portion of the court of appeals' decision.

In providing a thorough and objective explanation of its decisions, EPA did identify areas of scientific uncertainty, on which ATA and Respondent Appalachian Power Company, *et al.* (APC) have focused so singularly in their statements of the case. *E.g.*, ATA Br. 15; APC Br. 13. As EPA explained in response to comments on the PM rule, "uncertainty and controversy on scientific issues are inherent in the statutory scheme, which in effect requires decisions 'at the very "frontiers of scientific knowledge"' where 'disagreement among the experts is inevitable.'" PM App. 266 (quoting *Lead Indus.*, 647 F.2d at 1160); see also 62 Fed. Reg. 38,880-38,881 (1997). Those inherent uncertainties do not transform the observed adverse health effects addressed by the revised standards into merely theoretical or hypothetical risks.

2. EPA did not revise the PM and ozone NAAQS simply to change its method for "management of predicted risks addressed by the then-current standards" (APC Br. 14). EPA acted because new scientific evidence revealed that adverse health effects are associated with lower concentrations of PM and ozone than had been indicated by the evidence available in prior NAAQS reviews. Congress has required that EPA periodically review the air quality criteria and NAAQS in light of new scientific knowledge and revise them as appropriate. 42 U.S.C. 7409(d)(1). When the Administrator reviewed and revised the PM and ozone NAAQS, she did so based on "the latest scientific knowledge" of the effects associated with the presence of these two pollutants in the ambient air. 42 U.S.C. 7408(a)(2).

The evidence available in 1997 differed significantly from that available earlier, reflecting refinements in analytical techniques, substantial new research, and new information on the kind and severity of health effects associated with the two pollutants.[5] For example, when EPA promulgated the

[5] The Administrator noted that the science underlying the 1997 decisions was more extensive and of higher quality than that underlying

PM_{10} standards in 1987, only "a small number" of epidemiological studies were available for determining the concentrations at which PM is likely to affect public health. 52 Fed. Reg. 24,641 (1987). EPA set the 1987 PM_{10} standards at levels that reasonably appeared to provide an adequate margin of safety against the health effects identified in the studies then available. See *NRDC*, 902 F.2d at 971-972 (summarizing basis for 1987 PM standards).

By the time of the most recent review, however, a large body of new evidence on the health effects of the two pollutants was available. More than 60 epidemiological studies showed that PM concentrations below the level of the 1987 standards are the likely cause of premature death and other serious adverse health effects. See 99-1257 Pet. Br. 9-10.[6] Similarly, new research demonstrated that adverse health effects are caused by exposure to ozone at lower concentrations, over longer periods, and at more moderate levels of exertion than had been shown by studies available during previous ozone reviews. See *id.* at 11-12. Accordingly, the Administrator's decision to revise the standards did not reflect merely a different judgment about how to manage the same risks her predecessors had considered.

3. CASAC unambiguously advised the Administrator that the PM and ozone NAAQS should be revised, unanimously recommending that EPA replace the one-hour ozone

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the previous PM and ozone standards, which had been upheld on judicial review. 62 Fed. Reg. at 38,881 n. 53; see *NRDC*, 902 F.2d 962 (1987 PM NAAQS); *American Petroleum Inst.*, 665 F.2d 1176 (1979 ozone NAAQS).

[6] The final chapter of the PM Criteria Document, which the Clean Air Scientific Advisory Committee (CASAC) characterized as the "best ever example of a true integrative summary of the state of knowledge about the health effects of airborne PM" (PM App. 3150), concluded that the available evidence "provide[s] ample reason to be concerned that there are detectable human health effects attributable to PM at levels *below* the current NAAQS." *Id.* at 1870 (emphasis added). See 99-1257 Pet. Br. 4 (describing CASAC's role).

NAAQS with an eight-hour standard (Ozone App. 236-238), and almost unanimously (19 of 21 panel members) recommending that EPA establish $PM_{2.5}$ standards (PM App. 3162). Cf. ATA Br. 6-7, 14-15; APC Br. 12-13. Moreover, CASAC concluded that EPA's Criteria Documents and Staff Papers, which recommended a range of NAAQS levels that encompassed the levels actually chosen, provided "an adequate scientific basis for regulatory decisions." PM App. 3151, 3162; Ozone App. 235, 236. CASAC followed its traditional practice of declining to provide a consensus recommendation on specific levels for the revised NAAQS, but that did not relieve the Administrator of her duty to reach decisions on specific NAAQS levels. Once the Administrator had concluded that the NAAQS required revision, she—unlike CASAC—had to resolve the uncertainties associated with those decisions. See PM App. 265-269.[7]

Similarly, CASAC's observation that no "bright line" distinguished the alternative levels EPA considered for the revised ozone NAAQS did not mean that CASAC disagreed with EPA's decision to revise the ozone NAAQS. CASAC's observation reflects the unexceptional fact that, like other common air pollutants, ozone lacks a demonstrated "threshold," 62 Fed. Reg. at 38,863; *i.e.*, there is no "bright line" below which scientists have observed a cessation of physiological or biological effects. See *American Petroleum Inst.*, 665

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[7] CASAC has typically acknowledged, as it did in those reviews, that final NAAQS decisions require the Administrator to make public health policy judgments as well as determinations of a strictly scientific nature. *E.g.*, PM App. 3164. Since CASAC began advising EPA in the late 1970s, it has generally stopped short of offering consensus recommendations on specific NAAQS levels and has instead advised on the ranges of levels that the science supports. *Id.* at 266. Nevertheless, CASAC panel members may express individual views. For example, the level of protection afforded by the revised PM NAAQS falls toward the mid-portion of the range of protection afforded by the PM standards recommended by those CASAC panel members who chose to express individual views. See *id.* at 265-269.

F.2d at 1185; *Lead Indus.*, 647 F.2d at 1152-1153 & n.43; *NRDC*, 902 F.2d at 969; see *Casarett & Doull's Toxicology: The Basic Science of Poisons* 19, 79-80 (5th ed. 1996). The evidence showed a continuum of risk within the range considered, with statistically significant decreases in risk and corresponding increases in public health protection for successively more stringent eight-hour ozone standards, 62 Fed. Reg. at 38,864. CASAC clearly understood that observed phenomenon. Ozone App. 297-298; 62 Fed. Reg. at 38,863.[8]

4. EPA and CASAC agreed that additional research into the health effects of PM pollution is warranted, but that conclusion did not affect the timetable for implementation of the revised PM standards. Cf. APC Br. 13. Instead, EPA recognized that, for practical reasons, it would take at least five years to begin implementation. 62 Fed. Reg. at 38,427-38,428. Prior to implementation, a nationwide network of $PM_{2.5}$ monitors has to be installed. *Id.* at 38,427. In addition, because the $PM_{2.5}$ NAAQS are based on an average of concentrations over three years, a prolonged monitoring effort is necessary before the States can begin to propose designations of areas as attainment or nonattainment for the $PM_{2.5}$ NAAQS. *Id.* at 38,427-38,428.[9]

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[8] The scientific community's inability to detect an effects threshold for a pollutant does not mean that medically significant effects are actually known or thought to occur at very low levels. Indeed, there may be little or no evidence supporting that possibility. See, *e.g.*, 62 Fed. Reg. at 38,676; *Casarett & Doull's Toxicology*, *supra*, at 20 (it is "difficult to establish a true 'no effects' threshold for any chemical" and "impossible to scientifically prove the absence of a threshold, as one can never prove a negative").

[9] Implementation of the revised ozone standard has been delayed due to uncertainty arising from the court of appeals' ruling on EPA's authority to implement the standard, which is under review by this Court in No. 99-1257. EPA is also in the process of responding to the court of appeals' remand of the ozone standard for consideration of alleged potential "beneficial" effects associated with the presence of ground-level ozone in the ambient air. Pet. App. 44a-49a. That aspect of the remand, which EPA has not challenged, has nothing to do with the question posed by ATA's cross-petition, despite ATA's suggestions to the contrary. See ATA Br. 8-9.

III. Proceedings Below

The court of appeals' decision reaffirms the long-settled principle that, "in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards." Pet. App. 19a. The court of appeals has consistently held that EPA must set NAAQS based on the "health effects relating to pollutants in the air" and not on alleged costs or any other effects that may result from implementation of the NAAQS. *E.g.*, *NRDC*, 902 F.2d at 973 (EPA may not consider alleged health effects of unemployment petitioners predicted would flow from implementation of 1987 PM NAAQS); see *Lead Indus.*, 647 F.2d at 1148; see also pp. 2-3, *supra*.

The court of appeals expressly rejected ATA's argument that it should reconsider its decision in *Lead Industries* because that case was decided prior to *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). The court explained (Pet. App. 19a-20a):

> The *Lead Industries* decision was made in *Chevron* step one terms, * * * as the post-*Chevron* progeny of *Lead Industries* have made clear. See *NRDC*, 902 F.2d at 973 ("Consideration of costs . . . would be flatly inconsistent with the statute, legislative history and case law on this point"); *NRDC* v. *EPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (in banc) ("*Vinyl Chloride*") ("[S]tatute on its face does not allow consideration of technological or economic feasibility. . . . Congress considered the alternatives and chose to close down sources or even industries rather than to allow risks to health.").

The court of appeals also rejected the argument that, even if, in initially setting NAAQS, EPA cannot consider costs

and other effects of implementation, it may do so when revising NAAQS. Pet. App. 20a. Finally, the court rejected the argument that Congress's direction that CASAC advise EPA on, among other things, "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of NAAQS, CAA § 109(d)(2)(C)(iv), 42 U.S.C. 7409(d)(2)(C)(iv), signals that EPA should consider those factors in revising NAAQS. Pet. App. 21a. Instead, the court of appeals held that the Act directs CASAC to provide that advice in light of EPA's separate duty to inform the States on control strategies. *Ibid.*

SUMMARY OF ARGUMENT

When Congress enacted Section 109 as part of the Clean Air Amendments of 1970, it made a policy choice that EPA should set NAAQS at levels requisite to protect public health and public welfare. The text, structure, and context of Section 109 establish that Congress intended EPA to set and revise NAAQS based on the health and welfare effects posed by the presence of criteria pollutants in the ambient air, and not on the feasibility, costs, or other effects of implementing the NAAQS. Congress decided that consideration of the latter should instead await the process of *implementation*, where those factors will be manifested in concrete terms. The Clean Air Act makes clear that the States and EPA may give appropriate consideration to such factors at various stages of the implementation process.

Section 109(b)(1) directs EPA to set primary NAAQS at levels "requisite" to protect "public health" with "an adequate margin of safety." 42 U.S.C. 7409(b)(1). There is no ambiguity in that command. EPA must set primary NAAQS at levels necessary to ensure that the general population is protected, with a reasonable degree of certainty, against the risk of adverse health effects. Similarly, Section 109(b)(2) directs EPA to set secondary NAAQS at levels "requisite to

protect the public welfare." 42 U.S.C. 7409(b)(2). Congress spoke directly to the issue of what factors EPA may consider when it sets and revises NAAQS. Section 109 states that both primary and secondary NAAQS are to be based on the air quality criteria that EPA develops under Section 108. Section 108, in turn, directs that air quality criteria are to "accurately reflect" the "latest scientific knowledge" on the effects on public health and public welfare that may be associated with "the presence of" a criteria pollutant "in the ambient air." 42 U.S.C. 7408(a)(2).

The evolution of the 1970 Act confirms that Congress did not intend EPA to base NAAQS on consideration of any effects except those posed by the presence of the pollutant in the ambient air. Under the Air Quality Act of 1967, the States were to set regional ambient air quality standards consistent with two pieces of information prepared by the Department of Health, Education, and Welfare: air quality criteria (defined in the same manner as in the 1970 Act) and information regarding pollution control techniques (including information on the technological feasibility and cost-effectiveness of those techniques). When Congress determined in 1970 that uniform national standards were necessary, it retained the requirement that EPA prepare and provide the States with information on pollution control techniques, but specified that NAAQS should be based on the air quality criteria alone.

The court of appeals' and EPA's shared understanding of Congress's intent is consistent with what this Court has described as the "technology-forcing" character of the Clean Air Act. See *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257 (1976). Congress understood that setting NAAQS on the basis of health and welfare considerations would give industry an incentive, at the implementation stage, to develop innovative and cost-effective control strategies. Congress's actions since 1970 confirm that Congress reserved to itself the responsibility for determining whether to adjust the

NAAQS process in response to industry complaints about the costs, technological challenges, or other burdens of compliance. Since 1970, Congress has repeatedly been confronted with evidence of widespread failure to attain NAAQS by applicable statutory deadlines. Each time, Congress has heard complaints regarding the economic and technological feasibility of attaining the standards. Yet, each time, Congress has addressed the problem by amending the timetable or manner of implementing the NAAQS and not by amending the legal standard that governs EPA's decisions to set and revise them.

ATA and its amici offer no persuasive arguments that Congress intended NAAQS to be based on feasibility or costs of implementation. They are unable to identify any statutory provision directing EPA to consider such factors. To the contrary, ATA relies on statutory provisions that confirm Congress's intent that EPA and the States consider such factors in the NAAQS-implementation process, but not in the NAAQS-setting process. The amici supporting ATA urge this Court to apply cost-benefit principles in setting NAAQS, because, in their view, it would represent a better policy choice. But the wisdom and utility of basing measures to protect public health on cost-benefit analysis are a subject of robust public debate. Congress has chosen not to apply that regulatory approach in setting NAAQS, and any decision to depart from Congress's 30-year course should come from Congress itself and not from the courts.

As we explain in our opening brief in the related case, No. 99-1257, Section 109 of the Clean Air Act does not violate the nondelegation doctrine. Moreover, because the meaning of Section 109 is clear, the canon that the Court should construe ambiguous terms of legislation to avoid reaching constitutional issues has no place in this case. But even if the court of appeals' analysis of the constitutional issue were correct, allowing EPA to consider factors such as economic and technological feasibility when it sets and revises NAAQS

would not resolve or avoid the constitutional issue. ATA's proposed approach would *expand*, rather than narrow, the range of factors EPA must consider. Injecting those factors into EPA's NAAQS decision-making process would not provide the "determinate criterion" that the court of appeals believed was necessary under the nondelegation doctrine.

ARGUMENT

I. CONGRESS HAS DIRECTED EPA TO ESTABLISH NAAQS BASED SOLELY ON CONSIDERATION OF THE EFFECTS ON PUBLIC HEALTH AND PUBLIC WELFARE CAUSED BY THE PRESENCE OF CRITERIA POLLUTANTS IN THE AMBIENT AIR

Congress introduced the NAAQS concept through the Clean Air Amendments of 1970. See *Train* v. *NRDC*, 421 U.S. 60, 63-65 (1975); note 2, *supra*; see also *Union Elec.*, 427 U.S. at 256-257. Since then, EPA has consistently applied Section 109 according to its terms, which require NAAQS to be set at levels "requisite to protect" public health and public welfare. 42 U.S.C. 7409(b). Congress prescribed that NAAQS are to be "based on" the air quality criteria EPA develops under Section 108 and that those criteria are to provide an accurate scientific assessment of the effects on public health and public welfare posed by "the presence of [the] pollutant in the ambient air, in varying quantities." 42 U.S.C. 7408(a)(2). Accordingly, for the last three decades, EPA has understood that, when promulgating NAAQS, it may not consider technological feasibility, costs, or other alleged effects flowing from implementation of the standards. Instead, Congress intended those factors to be considered when the States and EPA decide how NAAQS should be implemented.[10]

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[10] When promulgating the first NAAQS, Administrator Ruckelshaus responded to comments questioning their feasibility by stating that the CAA "does not permit any factors other than health to be taken into

ATA asks this Court to overturn, not only 30 years of agency practice, but 20 years of court of appeals precedent decided in the course of reviewing prior NAAQS. See Pet. App 19a; pp. 2-3, *supra*. That extraordinary action is unwarranted. Congress has unambiguously indicated its intent that NAAQS should be based on scientific evidence regarding the health and welfare effects of ambient pollution, and not on the technological feasibility, costs, or other effects of measures to reduce pollution levels.

A. The Text And Context Of Sections 108 And 109 Require EPA To Set NAAQS Based Solely On The Health And Welfare Effects Of The Criteria Pollutants' Presence In The Ambient Air

The court of appeals and EPA have correctly concluded that Congress "has directly spoken to the precise question at issue" by specifying precisely what factors EPA is to consider when it sets and revises NAAQS. *Chevron*, 467 U.S. at 842. Section 109(b)(1) of the Act directs EPA to set primary NAAQS at a level "requisite to protect the public health" and to set secondary NAAQS at a level "requisite to protect the public welfare." See 42 U.S.C. 7409(b)(1) and (2). The language of the 1970 Act demonstrates that Congress conceived of NAAQS as the means to identify, as the first step of the CAA regulatory program, the ambient air quality standards that are necessary to protect public health and public welfare. Neither Section 108, which specifies the kinds of factual information upon which NAAQS must be based, nor Section 109, which contains the legal test NAAQS

account in setting the primary standards." 36 Fed. Reg. 8186 (1971). See also, *e.g.*, 62 Fed. Reg. at 38,683-38,688, 38,878-38,883 (detailed response to comments on this issue in the PM and ozone rulemakings); *Hearings on Clean Air Act: Ozone and Particulate Matter Standards Before the Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety and the Senate Comm. on Env't and Pub. Works*, 105th Cong., 1st Sess. 276, 282 (1997) (*1997 Hearings*) (testimony of Administrator Browner).

must meet, directs EPA to consider economic or technological feasibility, or similar factors, when promulgating NAAQS. See *Lead Indus.*, 647 F.2d at 1149; *NRDC*, 824 F.2d at 1158.

Section 109's command that NAAQS be set at levels "requisite" to protect health and welfare unambiguously directs that the levels to be set achieve that objective, regardless of cost or other considerations. 42 U.S.C. 7409(b). The plain language of the Act also specifies the factors that EPA may consider. Section 109(b)(1) expressly requires NAAQS to be "based on" the air quality "criteria" that EPA issues under Section 108. 42 U.S.C. 7409(b)(1). Section 108(a)(2), in turn, limits the kind of information to be included in the "criteria" to "the latest scientific knowledge" about effects on public health and public welfare "which may be expected from the presence of such pollutant in the ambient air." 42 U.S.C. 7408(a)(2); see pp. 5-6, *supra*. Section 108(a)(2) makes no mention whatsoever of effects from, or the feasibility of, achieving the NAAQS. Congress expressly directed the focus on health and welfare effects from the *presence* of a criteria pollutant in the air and not on economic or other effects of measures to *remove* that pollutant from the air.[11]

The context in which Sections 108 and 109 appear also confirms that reading. Congress has indicated expressly when and to what extent costs and implementation effects shall be considered in the NAAQS regulatory process. See *Union Elec.*, *supra*. Those factors can play a role in the States' and EPA's decisions on how to *attain* the NAAQS. For example, the States are charged with developing SIPs

[11] This Court has recognized that, "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (quoting *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929)).

governing how NAAQS will be implemented within their borders. See CAA § 110, 42 U.S.C. 7410. States may properly consider the technological feasibility and costs of implementation when formulating the SIPs, and EPA may not override those judgments so long as the SIPs will achieve attainment of the NAAQS. See *Union Elec.*, 427 U.S. at 256-269. *Union Electric* recognizes that the CAA does not allow a State to rely on cost and feasibility considerations to excuse failure to meet the CAA's deadlines for attaining the national health-based standards. *Id.* at 266-269. Nevertheless, the Court concluded that "the [Clean Air Amendments of 1970] offer ample opportunity for consideration of claims of technological and economic infeasibility." *Id.* at 268.[12]

In telling contrast to the provisions governing NAAQS promulgation, Congress included provisions in the 1970 Act expressly directing EPA to consider costs and similar factors when making other decisions. See *Union Elec.*, 427 U.S. at 257 n.5 (noting latter sections of 1970 Act).[13] This Court "generally presume[s]" that, "[w]here Congress includes

[12] Section 110 of the 1970 Act, which was construed in *Union Electric*, has since been revised, but the principles discussed in that case remain fully applicable. See *Virginia* v. *EPA*, 108 F.3d 1397, 1407-1409 (D.C. Cir. 1997); 42 U.S.C. 7410(k).

[13] In Sections 111(a)(1), 202(a)(2) and 231(b) of the 1970 Act, for example, Congress directed that EPA consider economic and technological feasibility in establishing, respectively, standards of performance for new stationary sources of air pollution, standards for new motor vehicles (except those subject to statutory standards under Section 202 (b)), and aircraft emission standards. See 84 Stat. 1683, 1690, 1704. In Section 202(b)(5)(A), it provided for one-year suspensions, on feasibility grounds, of the statutory motor vehicle standards and for interim standards based on the availability and cost of control technology. See *id.* at 1691. Similarly, in Sections 110(e)(1), 110(f), and 112(c)(1) and (2) of the 1970 Act, Congress authorized EPA to grant temporary postponements, on feasibility grounds, of NAAQS attainment dates and applicable control requirements. See *id.* at 1682-1683, 1685-1686.

particular language in one section of a statute but omits it in another section of the same Act, * * * Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown* v. *Gardner*, 513 U.S. 115, 120 (1994) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). See also *United States* v. *Shabani*, 513 U.S. 10, 14 (1994).

In sum, the plain language of the CAA shows that Congress itself considered the costs and other effects that might flow from implementing the NAAQS and chose to have EPA set standards at levels that will protect public health and public welfare. As in *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490 (1981), "Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of [public] health above all other considerations." *Id.* at 509. Neither EPA nor the courts are free to overrule that choice.

B. The Evolution Of The 1970 NAAQS Provisions Confirms That Congress Made A Policy Choice Not To Base NAAQS On Consideration Of The Technological Feasibility Or Cost-Effectiveness Of Pollution Control Measures

The CAA provisions at issue here are an outgrowth of congressional action that began in 1963. See note 2, *supra*. The legislative evolution of those provisions leaves no doubt that Congress meant what the plain language says.

Congress introduced the concept of air quality criteria in the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392, which expanded a federally funded program of air pollution research. Section 3(c)(2) of that Act required the Secretary of HEW to "compile and publish criteria" when he determined that any particular "air pollution agent" was "producing effects harmful to the health or welfare of persons." 77 Stat. 395. The 1963 Act defined air quality criteria much as the term is defined today: the criteria were to "reflec[t] accurately the latest scientific knowledge useful

in indicating the kind and extent of such effects which may be expected from the presence of such air pollution agent (or combination of agents) in the air in varying quantities." *Ibid.* Accord, S. Rep. No. 638, 88th Cong., 1st Sess. 7 (1963).

The Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, retained the requirement that the Secretary of HEW develop air quality criteria. § 107, 81 Stat. 490-491. But the Act also introduced into federal law the concept of air quality standards. Those standards, however, differed from NAAQS in two respects. First, Congress envisioned that the *States* would develop those standards, with federal assistance, and apply them on a *regional* basis within each State's borders. Second, Congress encouraged the States to adopt regional ambient air quality standards "consistent with" both (a) the air quality criteria *and* (b) information on pollution control techniques. § 108(c), 81 Stat. 492-494.

The 1967 Act preserved the 1963 Act's conception of air quality criteria, providing that they should "accurately reflect the latest scientific knowledge" on the health and welfare effects "which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities." § 107(b)(2), 81 Stat. 491.[14] The 1967 Act went beyond the 1963 Act, however, by

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[14] The 1967 Act's definition of air quality criteria was thus virtually identical to the definition carried forward into the 1970 Act. Section 107(b)(3) of the 1967 Act provided that the criteria "shall include" the same information that is required today under Section 108(a)(2)(A) to (C). See 42 U.S.C. 7408(a)(2)(A)-(C). See pp. 5-6, *supra*. The criteria were to set forth "an honest appraisal of the available knowledge relating to the health and welfare hazards of air pollution," not influenced by economic and technical considerations:

> [Air quality criteria] define the health and welfare considerations that must be taken into account in the development of standards and regulations. *Economic and technical considerations have a place in the pattern of control activity but not in the development of criteria.*

H.R. Rep. No. 728, 90th Cong., 1st Sess. 16 (1967) (emphasis added); accord S. Rep. No. 403, 90th Cong., 1st Sess. 26-27 (1967).

directing the Secretary of HEW to provide the States with a separate body of information on recommended pollution control techniques, including information on the "economic feasibility" and "cost-effectiveness" of the control techniques. § 107(c), 81 Stat. 491; see H.R. Rep. No. 728, 90th Cong., 1st Sess. 9-13 (1967).

The 1967 Act directed the Secretary to provide information on both air quality criteria and control techniques in order to create incentives for States to develop their own air quality standards that were "at a minimum adequate for the protection of public health and which can be achieved through the application of feasible control techniques." H.R. Rep. No. 728, *supra*, at 18; see also S. Rep. No. 403, 90th Cong., 1st Sess. 26, 28 (1967) (standards would be "influenced not only by a concern for the protection of health or welfare, but also by economic, social, and technological considerations"). Congress accordingly provided that those standards would "be the air quality standards applicable to such State" if the Secretary of HEW determined that the State standards were "consistent with the air quality criteria *and* recommended control techniques issued pursuant to section 107." § 108(c), 81 Stat. 492 (emphasis added).

Three years later, Congress determined that the "response of the States * * * was disappointing," and it enacted the 1970 Clean Air Amendments to "sharply increase[] federal authority." *Train*, 421 U.S. at 64-65. Congress directed EPA to develop nationally uniform federal standards—the NAAQS—and it deliberately narrowed the basis for setting the standards. Congress retained the distinction between air quality criteria and information on pollution control techniques that it had made in the 1967 Act. See 42 U.S.C. 7408(a)(2) (defining air quality criteria); 42 U.S.C. 7408(b) (requiring issuance of information on air pollution control techniques). Congress specified, however, that the NAAQS would be "based on" the "criteria" alone. 42 U.S.C. 7409(b)(1) and (2). Congress consciously provided for consid-

eration of the feasibility and effects of implementing the standards during later stages in the regulatory process. See pp. 20-21, *supra*. Those changes clearly reflected a deliberate legislative decision to narrow the basis on which EPA, as HEW's successor, would establish the national ambient air quality standards.[15]

Viewed in historical context, Congress's intent is thus clear. Since 1963, Congress has conceived of air quality criteria as scientific information on the effects on public health and public welfare posed by the presence of a pollutant in the ambient air. In 1967, Congress experimented with a federal program in which States would set regional air quality standards based on air quality criteria and information regarding the economic and technological feasibility of measures to reduce pollution. In 1970, Congress concluded that the experiment was a failure and replaced it with a program in which EPA would set national air quality standards based on air quality criteria alone, see *Train*, 421 U.S. at 63-65, while preserving the ability of EPA

[15] In hearings that preceded the 1970 Act, the HEW official responsible for implementation of the 1967 Act testified that the intent of the 1967 Act was to achieve regional air quality standards that were sufficient to protect health, but that the regional standards that had been adopted in fact "reflect[ed] the desired socio-economic status of those particular regions." *Hearings on Air Pollution Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Pub. Works*, 91st Cong., 2d Sess. Pt. 4, at 1488, 1489 (1970), (*Air Pollution Hearings*) *reprinted in* 2 Staff of Senate Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970* at 1183-1184 (Comm. Print 1974) (hereinafter 1970 Leg. Hist.). He therefore advocated national standards "to be sure * * * throughout the Nation, that no area can be any worse than a level of air quality that will be protective of health." *Id.* at 1184. Congress adopted that approach. Senator Muskie, the primary architect of the Clean Air Amendments of 1970, explained that changes in the law were necessary precisely because experience under the 1967 Act had revealed that economic and technological considerations had been used "to compromise the public health." See 116 Cong. Rec. 32,901 (1970) (1 1970 Leg. Hist. 226-227).

and the States to consider costs and feasibility in the implementation stage of the regulatory process, where specific emission limitations and control requirements are imposed, see *Union Elec.*, 427 U.S. at 266-269.

C. Congress's Direction That EPA Set NAAQS Based Solely On Health And Welfare Effects Is Consistent With The Clean Air Act's "Technology-Forcing" Objectives

As this Court has recognized, Congress's decision to set NAAQS at levels "requisite" to protect public health and public welfare—and to postpone questions of feasibility to the implementation stage—rests on a deliberate policy judgment that the NAAQS would have a "technology-forcing character." *Union Elec.*, 427 U.S. at 257; *Train*, 421 U.S. at 91. Congress knew that setting the NAAQS based on health and welfare considerations could, at the implementation stage, "force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Union Elec.*, 427 U.S. at 257. It also knew that technology forcing "necessarily entails certain risks." *Id.* at 269. "Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking." *Ibid.*[16]

The Court's understanding of the CAA's "technology-forcing character" is well founded. See *NRDC*, 824 F.2d at 1158; *Lead Indus.*, 647 F.2d at 1149. For example, the Senate Report accompanying the 1970 Amendments recog-

[16] Since 1970, industry has largely met the challenge of technological innovation with the result that, historically, EPA has overestimated, at the time of promulgation, the cost of attaining NAAQS. PM App. 3471-3473; see also E. Goodstein & H. Hodges, *Polluted Data*, The American Prospect, No. 35, at 64-69 (Nov.-Dec. 1997) ("In every case we have found where researchers have calculated actual regulatory costs and then compared them to *ex ante* estimates, the estimate exceeded the actual cost by at least 30 percent and generally by more than 100 percent.").

nized that attaining the new standards would "require major investments in new technology and new processes" and that some facilities might even close. S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970) (1 1970 Leg. Hist. 402-403). Nevertheless, the Report emphasized (*ibid.*):

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.
>
> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down * * *.

Senator Muskie, the Act's principal sponsor, while acknowledging the need to provide States with information on the economics and feasibility of pollution control technologies, "reemphasize[d] that the concept of this bill as it relates to national ambient air quality standards * * * is not keyed to any condition that the Secretary finds technically and economically feasible." 116 Cong. Rec. 33,099 (1970) (1 1970 Leg. Hist. 342). Instead, "the concept is of public health, and the standards are uncompromiseble in that connection." *Ibid.* See also *id.* at 32,902 (1 1970 Leg. Hist. 227).[17]

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[17] Senator Muskie's understanding was shared by others. For example, Senator Cooper stated:

> [T]he philosophy of the bill abandons the old assumption of requiring the use of only whatever technology is already proven and at hand and of permitting pollution to continue when it is not economically feasible to control it. The bill proceeds instead to set out what is to be achieved, and places its reliance on a great effort to develop technology, to train and put to work the manpower to accomplish that purpose, and it assumes a readiness by industry and the people or the country to pay the costs of pollution control.

116 Cong. Rec. at 32,919 (1 1970 Leg. Hist. 262); see also S. Rep. No. 1196, *supra*, at 9 (1 1970 Leg. Hist. 409) (providing control techniques information to the States should not "lock in existing technology").

The CAA is "technology forcing" precisely because it dictates that NAAQS shall be based on public health and public welfare considerations and not on supposed "feasibility" constraints. The CAA was designed to stimulate the regulated community to find innovative ways, at the implementation stage, to meet the NAAQS. See 116 Cong. Rec. 32,902 (1970) (1 1970 Leg. Hist. 227) (Sen. Muskie) ("Our responsibility in Congress is to say that the requirements of this bill are what the health of the Nation requires, and to challenge polluters to meet them."). Congress clearly understood that the feasibility, costs, and other effects of implementing measures to attain the NAAQS would be considered only following promulgation of NAAQS, when the States and EPA could consider those factors in deciding how to attain the standards. See 116 Cong. Rec. at 32,918 (1 1970 Leg. Hist. 259-260) (Sen. Cooper).

D. Congress's Actions Since 1970 Confirm That EPA Has Correctly Discerned Congressional Intent

As this Court recognized in *Union Electric*, Congress ensured that considerations of economic and technological feasibility could be factored into the implementation process. 427 U.S. at 266-269. Congress also retained the prerogative of deciding—after the States and affected parties had explored both conventional and innovative control measures under the technology-forcing pressure of the Act—whether and how to alter the statutory scheme if the NAAQS could not realistically be attained within the prescribed time frames. See *Lead Indus.*, 647 F.2d at 1150; Pet. App. 68a-69a

(Tatel, J., dissenting). Congress has since exercised that prerogative a number of times. In doing so, it has confirmed that EPA is to set and revise NAAQS based on health and welfare considerations, and not on the effects of implementing the standards.[18]

For example, when Congress amended the Act in 1977, it addressed the difficulty that many areas had experienced with attaining the NAAQS. But Congress did so by changing how the NAAQS are implemented rather than changing how NAAQS are set. See 62 Fed. Reg. at 38,685. Congress was well aware that some areas of the country had been unable to attain some of the NAAQS. See, *e.g.*, H.R. Rep. No. 294, 95th Cong., 1st Sess. 207-217 (1977). Congress was also aware that significant scientific uncertainties are inherent in setting health-based standards. See *id.* at 43-51, 110-112. Furthermore, EPA had emphasized, in a memorandum responding to criticism in oversight hearings, that the original NAAQS were set without considering costs or feasibility,[19] and industrial groups had urged Congress specifically to revise Section 109 to allow consideration of "social and economic factors" in setting NAAQS.[20] In response, Congress made significant changes in the CAA's provisions for

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[18] Indeed, Congress had anticipated that it would conduct continuing oversight over disputes respecting economic and technological feasibility. See, *e.g.*, *Air Pollution Hearings* 1491 (2 1970 Leg. Hist. 1186) (Sen. Baker); 116 Cong. Rec. at 32,905 (1 1970 Leg. Hist. 236) (Sen. Muskie). Congress has been vitally involved in both "setting up the machinery on the one hand and making it work on the other." *Air Pollution Hearings* 1491 (2 1970 Leg. Hist. 1186) (Sen. Baker).

[19] *Hearings on Implementation of the Clean Air Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Pub. Works*, 92d Cong., 2d Sess., Pt. 1, at 311, 312 (1972) (memorandum from Robert L. Baum, Assistant General Counsel, to the Administrator).

[20] See, *e.g.*, *Hearings on the Clean Air Amendments of 1977 Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works*, 95th Cong., 1st Sess., Pt. 2, at 1077, 1085 (1977) (Manufacturing Chemists Ass'n and Dow Chemical Company).

implementing NAAQS, including, for example, an extension of the deadline for attaining the ozone NAAQS. See 91 Stat. 746-747. It also amended Section 109 of the Act to require periodic review and revision of NAAQS and to establish CASAC. See 91 Stat. 691. Congress made no change, however, in the substantive criteria for setting and revising NAAQS. See 62 Fed. Reg. at 38,685 & n.66 (describing the 1977 Amendments).

Congress also exercised its prerogative, several times during the 1980s, to adjust the NAAQS implementation scheme based on considerations of economic and technological feasibility. In 1981, it enacted legislation that gave the steel industry three additional years to meet the NAAQS attainment date of 1982 established by the 1977 Act. See Steel Industry Compliance Extension Act of 1981, Pub. L. No. 97-23, 95 Stat. 139. In 1983, when 218 areas had failed to meet the 1982 attainment date and could thus be sanctioned, Congress enacted a one-year moratorium on sanctions. See Department of Housing and Urban Development–Independent Agencies Appropriation Act, 1983, Pub. L. No. 98-45, 97 Stat. 219. In addition, Congress extended the time for compliance with the carbon monoxide and ozone NAAQS from December 31, 1987, to August 31, 1988. See H.R. J. Res. 395, 100th Cong., 1st Sess. (1987).

In 1990, Congress again made adjustments in the scheme for implementing NAAQS. The Clean Air Act Amendments of 1990 were an ambitious undertaking that almost doubled the size of the CAA in the United States Code. Congress responded, through detailed amendments, to problems that areas of the country continued to encounter in attaining the NAAQS. But Congress once again did so by adjusting the implementation scheme rather than by changing the way that NAAQS are set. See, *e.g.*, CAA §§ 181-192, 42 U.S.C. 7511-7514a (1994 & Supp. IV 1998). The 1990 Amendments are particularly instructive because Congress acted with full

knowledge of how NAAQS had been promulgated over the previous 20 years.

First, Congress had before it the final report of the National Commission on Air Quality (NCAQ), prepared pursuant to Section 323 of the 1977 Act, which charged the NCAQ with examining, among other things, "the economic, technology, and environmental consequences of achieving or not achieving" the Act's goals. Pub. L. No. 95-95, § 323(a), 91 Stat. 785. The NCAQ report discussed the long-standing principle that NAAQS are set based solely on health and welfare considerations and recommended that this principle remain unchanged.[21] Second, Congress indicated its awareness of the court of appeals' decision in *Vinyl Chloride*, which had expressly reaffirmed that EPA may not take into account economic or technological feasibility when setting NAAQS (824 F.2d at 1158-1159), by enacting amendments addressing other aspects of the en banc court's decision. See 104 Stat. 2531 (extensively amending Section 112 of the CAA, 42 U.S.C. 7412, governing the regulation of especially hazardous pollutants). Third, the House and Senate Reports accompanying the 1990 Amendments expressly reflected the understanding that primary NAAQS are to be "set at a level that 'protects the public health with an adequate margin of safety,' *without regard to the economic or technical feasibility of attainment*." H.R. Rep. No. 490, 101st Cong., 2d Sess., Pt. 1, at 145 (1990) (emphasis added); accord S. Rep. No. 228, 101st Cong., 1st Sess. 5 (1989).[22]

[21] National Comm'n on Air Quality Report 7, 55, 70 (Mar. 1981). The NCAQ report was the subject of joint hearings in 1981 and an important source for Congress's 1990 deliberations. See, *e.g.*, *Joint Hearing on Reports of the Nat'l Comm'n on Air Quality and the Nat'l Academy of Sciences Before the Senate Comm. on Env't and Pub. Works and the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 2-3 (1981) (remarks of Senators Stafford and Chafee); H.R. Rep. No. 490, 101st Cong., 2d Sess., Pt. 1, at 213 (1990).

This Court recently recognized that, when Congress enacts legislation "against the backdrop" of an agency's "consistent and repeated statements" of the agency's authority, the legislation may effectively ratify the agency's position. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1313 (2000).[23] This case, however, does not depend on an inference that Congress ratified EPA's interpretation of its authority. Congress has revisited the CAA numerous times over the past 30 years, and it has consistently adhered to its plainly stated original intention—long followed by EPA and the court of appeals—that NAAQS are to be set at levels requisite to protect public health and public welfare, without regard to the economic or technological feasibility of implementing those standards. Congress has itself thus directly and repeatedly *reaffirmed* that it meant what it originally said. See *Chevron*, 467 U.S. at 842-843 ("[i]f the intent of Congress is clear, that is the end of the matter").[24]

[22] After enactment of the 1977 Clean Air Act Amendments, various parties had continued to urge Congress to amend Section 109 to allow consideration of compliance costs. See, *e.g.*, *Hearings on Clean Air Act Oversight Before the Senate Comm. on Env't and Pub. Works*, 97th Cong., 1st Sess., Pt. 3, at 199, 238 (1981); *Hearings on Health Standards for Air Pollutants Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 86-87, 214 (1981). Congress again declined to do so.

[23] See also *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-602 (1983); *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274 (1974) (according "great weight" to long-standing interpretation "where Congress has re-enacted the statute without pertinent change"); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

[24] Even if there were any ambiguity in Congress's pronouncements, EPA's interpretation of the Act would be a reasonable one entitled to deference. See *Chevron*, 467 U.S. at 843-845.

II. ATA IS MISTAKEN IN INSISTING THAT THE CLEAN AIR ACT REQUIRES EPA TO CONSIDER NON-HEALTH FACTORS IN SETTING PRIMARY NAAQS

Notwithstanding the foregoing, ATA and its supporters mistakenly argue that the CAA's "text, structure, and purpose show that EPA must consider non-health factors in setting NAAQS." ATA Br. 32-47. They also argue that EPA should, as a matter of policy, employ cost-benefit analysis in setting NAAQS. See, *e.g.*, ATA Br. 35-36; APC Br. 30-31; AEI-Brookings Inst. Amici Br. This Court's responsibility, however, is to determine Congress's intent. Congress has deliberately rejected the cost-benefit approach that ATA and its supporters espouse, and Congress's determination is dispositive.

A. ATA's Supposed "Trilemma" Does Not Exist

ATA argues at the outset that setting primary NAAQS for non-threshold pollutants based on health considerations creates a "trilemma" in which EPA has only three regulatory options: (1) to set NAAQS at zero; (2) to set NAAQS at a non-zero level that cannot survive review under the arbitrary or capricious standard; or (3) to reject the court of appeals' ruling and employ cost-benefit analysis to set and revise NAAQS. ATA Br. 25, 29-30. ATA's supposed trilemma rests on a false trichotomy.

ATA's first prong presents no real difficulty. EPA has never encountered (and does not expect ever to encounter) the theoretical situation in which complete elimination of a criteria pollutant—including a so-called non-threshold pollutant—would be "requisite" to protect public health or public welfare. 42 U.S.C. 7409(b). ATA overlooks that scientists characterize a pollutant as "non-threshold" if they have not been able to identify a level below which there is no risk that exposure will cause a physiological or biological effect, *however small or fleeting*. See, *e.g.*, 61 Fed. Reg. at

65,727; *Casarett & Doull's Toxicology*, *supra*, at 19 (describing a "threshold" as "[a] dose below which the probability of an individual responding is zero"). Characterizing a pollutant as "non-threshold" does not mean that any group of persons, including sensitive persons, will actually suffer adverse health effects if exposed to a non-zero concentration of that pollutant. See, *e.g.*, 61 Fed. Reg. at 65,721-65,723; see also *Casarett's & Doull's Toxicology*, *supra*, at 80 (distinguishing between, *e.g.*, the "no observed effect level" and the "no observed adverse effect level"). Accordingly, EPA's characterization of a pollutant as "non-threshold" does not require EPA to set the NAAQS for that pollutant at zero.

ATA's second prong also presents no real problem. The CAA requires EPA to set primary NAAQS at levels that protect against "adverse" health effects—not every physiological effect that can be detected—and it requires EPA to protect the health of sensitive population groups rather than that of every sensitive individual. 42 U.S.C. 7409(b)(1); S. Rep. No. 1196, *supra*, at 10 (1 1970 Leg. Hist. 410). Moreover, EPA has consistently adhered to the principle that NAAQS must provide "a *reasonable degree of protection* * * * against hazards which research has not yet identified." *Ibid.* (emphasis added). See *Lead Indus.*, 647 F.2d at 1150. EPA therefore sets primary NAAQS at levels that provide protection from medically significant risks and *not* at levels that protect against any and all risks, or any and all effects. See, *e.g.*, *id.* at 1144, 1155 n.51.[25] ATA is accordingly mistaken in suggesting (ATA Br. 25, 29-30) that setting a non-zero NAAQS for a non-threshold pollutant is necessarily arbitrary and capricious. Indeed, EPA has

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[25] ATA is wrong in contending (ATA Br. 30) that the court of appeals' decision in *Lead Industries* bars EPA from engaging in a "systematic weighing of pros and cons" when promulgating primary NAAQS. That decision recognized that EPA must weigh factors that are relevant in deciding what level of protection is "requisite" to protect public health and public welfare. See 647 F.2d at 1146-1147.

properly established non-zero NAAQS for pollutants that are or may be non-threshold pollutants, and the court of appeals, applying the familiar arbitrary or capricious standard, has repeatedly rejected judicial challenges to those NAAQS.[26]

The only truly problematic option is the third prong of ATA's supposed trilemma. ATA's suggestion that EPA should ignore *Lead Industries* and set NAAQS on the basis of cost-benefit analysis (ATA Br. 30, 32) would require EPA to ignore 30 years of agency practice, 20 years of court of appeals precedent, and—most importantly—Congress's clearly stated contrary intent. See A. Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 Hous. L. Rev. 97, 102 (1987) (noting that "primary [NAAQS] are to be established not in light of what is 'feasible' or 'reasonable' (a formulation that would enable counterbalancing costs to be offset against the benefit of clean air) but rather on the sole basis of what is 'requisite to protect the public health'").

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[26] *NRDC*, 902 F.2d 962 (1987 PM NAAQS); *American Petroleum Inst.*, 665 F.2d 1176 (1979 ozone NAAQS); *Lead Indus.*, 647 F.2d 1130 (lead NAAQS). ATA's assertion that a non-zero NAAQS must be arbitrary (ATA Br. 31) also misconceives the arbitrary or capricious standard of judicial review. Under that standard, "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 42 (1983). When a court reviews a NAAQS, it accordingly examines whether EPA has set an air quality standard that is reasonable in light of the pertinent record evidence. See *NRDC*, 902 F.2d at 972; *American Petroleum Inst.*, 665 F.2d at 1187; see also 99-1257 Pet. Br. 26-31. The court of appeals below did not reach the question whether EPA's revised PM and ozone rules satisfy that standard. Pet. App. 4a-5a. But as we have explained in the companion case, EPA's revisions are plainly rational and rest on comprehensive analyses of the evidence respecting the public health and public welfare effects of PM and ozone. See 99-1257 Pet. Br. 8-15, 31-34 (describing EPA's PM and ozone rulemakings.

B. The Clean Air Act's Express Language Refutes ATA's View Of EPA's Obligations In Promulgating NAAQS

ATA and its supporters argue that the CAA requires EPA to consider "non-health factors," including "compliance costs," in promulgating NAAQS. See, *e.g.*, ATA Br. 33, 34; APC Br. 32. The statutory language on which they rely, however, does not support their contentions. Indeed, as we show below, their arguments depend heavily on extrapolating from isolated phrases, giving words unnatural definitions, and overlooking context. That approach is fundamentally unsound: statutes should not "be read as a series of unrelated and isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995). "Statutory construction is not an exercise in picking apart a complex statute and piecing the parts back together in a manner to effect a particular end." *Michigan* v. *EPA*, 213 F.3d 663, 673 (D.C. Cir. 2000).

1. *Section 109(b)(1): The term "public health."* ATA contends that EPA must take compliance costs into account when setting primary NAAQS at a level "requisite to protect the public health" (CAA § 109(b)(1), 42 U.S.C. 7409(b)(1)) because the term "public health" "has long connoted a sensitivity to comparative costs and benefits." ATA Br. 36; see also APC Br. 26; Ohio Br. 12. ATA derives that conclusion by extrapolating from a definition of the *vocation* of "public health" that appeared in a 1951 book entitled "The Cost of Sickness and the Price of Health." ATA Br. 34. That book defined "public health" as "the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency" through various means. See *id.* at 34-36; APC Br. 26 n.57. A definition of "public health" drawn from the vocational context, however, is inapt in the context presented here. Congress surely did not intend that NAAQS would be set at a level "requisite to protect [the science and art of preventing disease]" (42 U.S.C. 7409(b)(1)). See, *e.g.*, *Textron Lycoming Reciprocating Engine Div.* v.

Automobile Workers, 523 U.S. 653, 657 (1998)("the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").[27]

The phrase "public health" should be given its ordinary or natural dictionary meaning in light of the context in which it is used. See, *e.g.*, *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997). Viewed in that light, Section 109(b)(2) clearly directs that EPA must set NAAQS at levels requisite to protect the general population, or identifiable groups within communities, from medically significant effects.[28] Nothing in the language of Section 109(b)(1) directs—or even allows—EPA to set NAAQS at levels inadequate to protect the public from adverse medical effects because of the costs of compliance or other effects of implementation. See Scalia, *supra*, 24 Hous. L. Rev. at 102. See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 29 (1997) ("[w]e

[27] ATA's reference to the vocation of public health is pertinent in this limited sense: Numerous public health professional associations commented favorably on EPA's proposed health-based PM and ozone NAAQS revisions. For example, the American Public Health Association (APHA), the oldest and largest such association, endorsed "the process by which the standards were developed" as "public health practice at its best—good science, good judgment, and active public participation." Letter from M. Akhter, M.D., M.P.H.., Executive Director, APHA, to C. Browner, Administrator, EPA, Docket IV-G-1826, at 1 (June 27, 1997).

[28] The word "public," in the context presented here, means "of, relating to, or affecting the people as an organized community." *Webster's Third New International Dictionary* 1836 (1976). Congress used that word to make clear that NAAQS protect the "health" of the general population, or of population groups, rather than of any specific individual. The word "health," in the context presented here, means "the state of being sound in body or mind." *Id.* at 1043. Congress used that term to denote the absence of medically significant adverse reactions to pollution exposure, in contrast to inconsequential physiological responses that would not impair the "soundness" of body or mind. Consistent with those definitions, the phrase "public health" means the "health of the community at large." *Black's Law Dictionary* 724 (7th ed. 1999).

ordinarily resist reading words or elements into a statute that do not appear on its face").

2. *Section 109(b)(2): The term "public welfare."* ATA also argues that the CAA's references to protecting "public welfare" must include protecting industry from "compliance costs." ATA Br. 37-39. Section 109(b)(2) expressly directs EPA, however, to set secondary NAAQS for criteria pollutants at a level "requisite to protect the public welfare from any known or anticipated adverse effects *associated with the presence of such air pollutant in the ambient air.*" 42 U.S.C. 7409(b)(2) (emphasis added). Congress plainly indicated that the public welfare effects of concern are those posed by exposure to air pollutants rather than the effects of measures to implement the NAAQS.[29]

3. *Section 108(a)(2): The contents of air quality criteria.* Similarly, ATA and others contend that, in prescribing the content of air quality criteria in Section 108(a)(2), Congress did not preclude other types of information. *E.g.*, ATA Br. 38-40; Ohio Br. 11. Section 108(a)(2) specifies, however, that air quality criteria shall provide information on "all identifiable effects on public health or welfare *which may be*

[29] The CAA's definition of "effects on welfare" further reinforces that conclusion. Section 302(h) states that reference to "effects on welfare" includes, but is not limited to, "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, *whether caused by transformation, conversion, or combination with other air pollution.*" 42 U.S.C. 7602(h) (emphasis added). Although that definition includes "effects on economic values," the context plainly shows that the "effects" of concern are those caused by the pollution itself. See *Lead Indus.*, 647 F.2d at 1148 n.36 (definition of "welfare" does not include the cost of compliance with NAAQS; it "only refers to the economic costs of pollution"); see generally *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 702 (1995) ("a word 'gathers meaning from the words around it' "); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (the canon of *noscitur a sociis* is applied to avoid giving "unintended breadth to the Acts of Congress").

expected from the presence of such pollutant in the ambient air." 42 U.S.C. 7408(a)(2) (emphasis added). Congress plainly indicated in Section 108(a)(2), that the effects of concern are those posed by the presence of the pollutant in the ambient air rather than compliance costs and other effects that arise from implementing the NAAQS.[30]

4. *Section 108(b)(1): Dissemination of pollution control information to States.* ATA and others contend that Section 108(b)(1)'s direction that EPA provide States with information on air pollution control techniques, 42 U.S.C. 7408(b)(1), indicates that Congress intended EPA to consider those matters in promulgating NAAQS. ATA Br. 40; APC Br. 38-39. But, as we have explained, Congress had directed HEW to provide the States with pollution control information under the 1967 Act, which called on States to develop regional air quality standards. See pp. 22-23, *supra*. Congress directed EPA to continue to provide States with that information under the 1970 Act, but expressly separated it from the newly created NAAQS promulgation process. Congress did so precisely because it decided that NAAQS should be health-based standards. See pp. 23-24, *supra*. Congress has nevertheless continued to ensure that

[30] ATA and Ohio emphasize the last sentence of Section 108(a)(2), which specifies air quality criteria shall include, "to the extent practicable," information on (A) variable factors (such as atmospheric conditions) which may alter the effects of a pollutant; (B) pollutants that may interact to produce adverse effects; and (C) any known or anticipated adverse effects on welfare. 42 U.S.C. 7408(a)(2). Those three categories of information, however, are all encompassed within, and limited by, Section 108(a)(2)'s general directive that "air quality criteria" shall provide information on the health and welfare effects posed by "the presence of such pollutant in the ambient air." 42 U.S.C. 7408(a)(2). Section 108(a)(2)'s additional directive to include the three specific types of information "to the extent practicable" does not expand the content of the criteria, but instead further refines it. 42 U.S.C. 7408(a)(2). See pp. 5-6, 21-22 and note 14, *supra*.

States have pollution control information so that the States can be prepared to implement the NAAQS. See *ibid.*

5. *Section 109(d)(2): CASAC's advice to EPA on effects of implementation.* ATA and others also contend that Section 109(d)(2)'s direction that CASAC provide EPA with advice on implementation effects, 42 U.S.C. 7409(d)(2)(C)(iv), indicates that Congress intended EPA to consider those matters in promulgating NAAQS. ATA Br. 41; APC Br. 41; Hatch Amicus Br. 22. The text of Section 109(d)(2), read as a whole, indicates that this is not so. Section 109(d)(2)(B) directs that CASAC periodically review the air quality criteria and NAAQS and make recommendations to the Administrator on new or revised standards or criteria. 42 U.S.C. 7409(d)(2)(B). Section 109(d)(2)(C) further provides that CASAC "shall *also*" advise the Administrator on various matters, including "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of [NAAQS]." 42 U.S.C. 7409(d)(2)(C) (emphasis added). As the CAA's text indicates, CASAC's advice on implementation effects under Section 109(d)(2)(C) is in addition to, and separate from, any recommendations on criteria and NAAQS that CASAC provides under Section 109(d)(2)(B). See Pet. App. 21a.[31]

[31] Congress plainly drew a distinction between effects that are relevant for purposes of promulgating a NAAQS—*viz.*, effects associated with "the presence of [a] pollutant in the ambient air" (42 U.S.C. 7408(a)(2))—and effects that are the subject of CASAC's advice-providing role under Section 109(d)(2)(C)—*viz.*, effects "which may result from various strategies for attainment" (42 U.S.C. 7409(d)(2)(C)(iv)). If Congress had not wished to draw that distinction, it would not have employed the distinctively different language. Indeed, the House Report that described the purpose of Section 109(d)(2)(C)(iv) suggests that CASAC's advice under that provision plays a limited role, even in the implementation process. It states that the information is not "to be used as a basis for the Administrator to disapprove any [SIP]," but "may be of interest and assistance to the

6. *Section 109(b)(1): Allowance for an adequate margin of safety.* ATA and its supporters also contend (ATA Br. 47; APC Br. 35-36; Ohio Br. 12-13, 15) that EPA has discretion to consider compliance costs because, when EPA sets primary NAAQS at a level "requisite to protect public health," it must "allow[] an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1). The court of appeals has twice rejected that argument. See *Lead Indus.*, 647 F.2d at 1148-1150; *Vinyl Chloride*, 824 F.2d at 1158-1159. In context, Section 109(b)(1) plainly directs EPA to set primary NAAQS with an "adequate margin of safety" to ensure that those health-based standards will be set at a sufficiently stringent level to achieve Section 109(b)(1)'s objective of protecting public health. See S. Rep. No. 1196, *supra*, at 10 (1 1970 Leg. Hist. 410); 116 Cong. Rec. at 33,099 (1 1970 Leg. Hist. 342) (Sen. Muskie).[32]

7. *Section 110(a)(2): Consideration of costs in the implementation program.* ATA also argues (Br. at 45-47) that EPA's longstanding interpretation of Section 109 is inconsis-

States and to Congress in fashioning future legislation." H.R. Rep. No. 294, *supra*, at 183.

[32] ATA mistakenly relies on the court of appeals' decision in *Vinyl Chloride*, which ruled that EPA may consider economic and technological feasibility when setting emission standards for especially hazardous pollutants under the 1970 version of Section 112. See pp. 3, 30-31, *supra*. The court concluded that Section 112 permitted EPA first to determine a "safe" level for a hazardous air pollutant—based solely on health factors—and then to consider cost and technological feasibility for the purpose of determining whether additional protection should be afforded by, for example, setting a standard at "the lowest feasible level." 824 F.2d at 1165-1166. The court expressly distinguished, however, the standard for promulgating NAAQS under Section 109. Writing for the en banc court, Judge Bork explained that the language and structure of the CAA showed that "Congress simply did not intend the economics of pollution control to be considered in [Section 109's] scheme of ambient air regulations." *Id.* at 1159. Congress has since amended Section 112, essentially creating a new scheme for setting emission standards for especially hazardous air pollutants. 42 U.S.C. 7412. See pp. 30-31, *supra*.

tent with its interpretation of other provisions of the CAA, where EPA does consider compliance costs in making regulatory decisions. ATA overlooks, however, that those other provisions involve different statutory language, subject matter, and policy choices. The cases ATA cites simply demonstrate that EPA may have discretion to consider costs in situations—unlike the situation posed by NAAQS promulgation—where Congress has not expressly prescribed what factors it should consider in making regulatory determinations.

For example, in *Michigan* v. *EPA*, *supra*, various States challenged EPA's determination, under Section 110(a)(2)(D), that certain "upwind" States were making a "significant contribution" to NAAQS-nonattainment problems in "downwind" States. 42 U.S.C. 7410(a)(2)(D). EPA identified 23 States that were "significant" contributors, and it required those States to reduce emissions to a level that could be achieved by employing "highly cost-effective controls." See 213 F.3d at 675. The court of appeals rejected various challenges to EPA's consideration of cost effectiveness. *Id.* at 675-678. The court concluded that the term "significant" was inherently ambiguous, that it had been construed in other contexts to include consideration of costs, and there was not—as under Section 109—"clear congressional intent to preclude consideration of costs." *Id.* at 678 (quoting *Vinyl Chloride*).[33]

[33] The other cases on which ATA relies (Br. 45-47) also involved provisions of the CAA that do not specify what factors EPA is to consider and that present no evidence of congressional intent to exclude costs. See *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 624 (D.C. Cir. 1998) (consideration of cost "appears to be congruent with both the congressional purpose not to disrupt the market for imported gasoline and the Supreme Court's instruction to avoid an interpretation that would put a law of the United States into conflict with a treaty obligation of the United States"); *NRDC* v. *EPA*, 937 F.2d 641, 645-646 (D.C. Cir. 1991) (text of provisions governing "prevention of significant deterioration" supports inference

8. *Section 109(d)(1): Revision of NAAQS.* APC, but not ATA, contends that Section 109(d)(1)'s directive that EPA revise the NAAQS "as may be appropriate" (42 U.S.C. 7409(d)(1)) expands the range of factors that EPA may consider when it revises NAAQS. APC Br. 39-40. The court of appeals correctly rejected the argument. Pet. App. 20a-21a. As that court noted, Section 109(d)(1) directs EPA to "make such revisions in such criteria and standards * * * as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section." 42 U.S.C. 7409(d)(1). Accordingly, the legal standard governing a decision to revise a NAAQS, and the factors that bear on the decision, are exactly the same as those for an initial decision to set a NAAQS.[34]

9. *Section 101(b)(1): Goals of the CAA.* ATA and others suggest that one of the CAA's general goals set out in Section 101(b) – to promote "the productive capacity" of the Nation's population, 42 U.S.C. 7401(b)(1)—should take precedence over the CAA's specific language in Sections 108 and 109 prescribing how NAAQS should be promulgated. *E.g.*, ATA Br. 42-43; APC Br. 23, 29-30. They essentially contend that Section 101(b)(1) should be read to impose a requirement to consider economic factors in all decision-making under the Act. Section 101(b)(1) simply states, however, that one of the purposes of the Act is "to protect and enhance the quality of the Nation's air resources *so as* to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1) (emphasis

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that Congress meant to "balance the values of clean air, on the one hand, and economic development and productivity, on the other.").

[34] APC's argument that EPA faces a higher burden to revise a standard than to set an initial standard is also wrong. APC mistakenly relies upon inapposite case law regarding an agency's obligation to explain a change in policy. See APC Br. 42. When EPA revises a NAAQS, it is not changing policy, but carrying out a specific duty imposed by the CAA to review NAAQS at least once every five years. 42 U.S.C. 7409(d)(1).

added). The provision expresses Congress's belief that improved air quality would enhance the Nation's productive capacity by reducing the harm that air pollution causes.[35] It does not alter the specific statutory directions that Congress set out in Sections 108 and 109 to achieve that goal. Cf. *American Textile Mfrs.*, 452 U.S. at 510 ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.").

10. *The UMRA and the RFA.* There is no merit to the suggestion (ATA Br. 48; Amici Hatch Br. 25) that two later-enacted statutes, the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.* (UMRA), and the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), require EPA to consider costs in promulgating NAAQS. Those Acts encourage agencies to consider the economic effects of agency actions, but each Act also provides that its specific requirements do not apply if those requirements would be inconsistent with the statute under which the agency is taking action. 2 U.S.C. 1535(b)(2) (Supp. IV 1998); 5 U.S.C. 604(a)(5) (1994 & Supp. IV 1998). There is a "clear inconsistency" (see Hatch Br. 25) between the requirements of the UMRA and the RFA and the requirement of Section 109 that NAAQS be based on the effects of ambient pollution on health and welfare. The UMRA and the RFA are pertinent in only one sense: They show that Congress is well aware that there are regulatory statutes that preclude consideration of costs. See generally Pet. App. 25a-31a.

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[35] See, *e.g.*, 116 Cong. Rec. at 42,522 (1 1970 Leg. Hist. 118) (remarks of Rep. Anderson) ("[a]ir pollution costs the United States over $12 billion annually," through ruined crops, aging of buildings and clothing, deterioration of steel in bridges, rails and ships); 116 Cong. Rec. at 32,901 (1 1970 Leg. Hist. 224) (remarks of Sen. Muskie) ("The costs of air pollution can be * * * measured in the billions of dollars of property losses.").

C. The Administrator Did Not Base Her NAAQS Decisions On Consideration Of Compliance Costs

After arguing that EPA has improperly construed Sections 108 and 109 to preclude consideration of non-health effects (ATA Br. 32-43), ATA reverses course and contends that EPA "may actually be considering non-health factors in setting NAAQS" (ATA Br. 43-45). That contention is without merit. Throughout the rulemaking proceedings, EPA was confronted with comments urging it to consider the technological feasibility, costs, and other alleged effects of implementing any new PM or ozone standards. EPA responded by explaining that the CAA requires that NAAQS be based on consideration of the health and welfare effects posed by "the presence of the pollutant in the air," rather than on consideration of the feasibility or effects of implementing the standards. See 62 Fed. Reg. at 38,683-38,689; *id.* at 38,878-38,883.[36] And while it is a matter of no relevance to this case, there is no evidence to support ATA's claim (ATA Br. 43-44) that previous EPA Administrators secretly based their NAAQS decisions on impermissible factors.[37]

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[36] Pursuant to executive order, EPA prepared a Regulatory Impact Analysis (RIA) for the two rules at issue here, as it must for any significant regulatory action. 62 Fed. Reg. at 38,702. EPA explained, however, that the RIA was for informational and implementation planning purposes only and could not play a part in the Administrator's decision on standard-setting. See *id.* at 38,703 (PM); *id.* at 38,887 (ozone); see also PM App. 3461-3462. An RIA is normally not a part of the record for judicial review of a NAAQS decision. Compare 42 U.S.C. 7607(d)(7)(A) with 42 U.S.C. 7607(d)(4)(B)(ii). EPA nevertheless elected to include the RIA in these rulemakings because it was potentially relevant to judicial review of issues arising under the RFA, 5 U.S.C. 601 *et seq.* See 5 U.S.C. 611 (1994 & Supp. IV 1998) (judicial review provisions). The court of appeals rejected the RFA challenges, Pet. App. 26a-31a, and they are not before this Court.

[37] ATA claims (ATA Br. 43-44), on the basis of a highly speculative reconstruction of the 1979 ozone rulemaking, that Administrator Douglas Costle "admitted" that he considered costs in reaching his 1979 decision to revise the ozone NAAQS. See M. Landy, M. Roberts & S. Thomas, *The Environmental Protection Agency: Asking the Wrong Questions from Nixon to Clinton* 66-70 (Oxford Univ. Press 1994); see also W. Wagner, *The Science Charade in Toxic Regulation*, 95 Colum. L. Rev. 1613, 1641-1643 (1995) (relying on Landy, *et al.*). That claim is not accurate. Costle understood that the statute required him to reach a decision based solely on the scientific evidence regarding health effects, and he ultimately made his decision on that basis. See Landy, *et al.*, *supra*, at 70-74; see also *American Petroleum Inst.*, 665 F.2d at 1185 (upholding 1979 ozone standard and specifically rejecting the claim that the Administrator should have considered the cost of implementing the standard).

D. Congress Has Resolved The Public Policy Question Of Whether Cost-Benefit Analysis Should Be Used In Setting NAAQS

ATA and its supporters argue that EPA should set NAAQS through cost-benefit analysis, balancing the benefits of clean air against the resulting economic costs of achieving that goal, because that technique, in their view, would improve EPA's decisionmaking process. *E.g.*, ATA Br. 30, 35-36; APC Br. 30-31. The question here, however, is whether Congress sanctioned that approach. The CAA's specific provisions show that Congress directed EPA to set NAAQS based on public health and public welfare objectives rather than on the cost-benefit methodology that ATA would prefer. Congress was entitled to make that choice.[38]

Congress has had sound reasons for adhering to that decision. Quantifying the nationwide environmental benefits

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[38] Congress's decision reflects what economists readily acknowledge: cost-benefit analysis can frequently play an important role in environmental regulation, but that methodology does not provide an appropriate basis for making decisions in every regulatory context. See AEI-Brookings Inst. Amici Br. 9-10 (noting that "[a]gencies should not be bound by a strict benefit-cost test," that "[n]ot all impacts of a decision can be quantified or expressed in dollar terms," and that decisionmakers must "give due consideration to factors that defy quantification"). Congress has made the legislative judgment that the methodology is not the appropriate one for EPA to use in setting NAAQS. See note 42, *infra*.

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of NAAQS in monetary terms creates a deceptive appearance of certainty, but is fraught with difficulties, such as placing a monetary value on preventing a senior citizen's premature death or a child's asthma attack.[39] Quantifying the costs associated with implementing NAAQS is a no less uncertain undertaking. Because NAAQS are set on a national level, because States have broad latitude in the SIP process to select local pollution control strategies, and because the time period from promulgation to full implementation can span many years and produce unforeseen technological innovation, estimates of implementation costs are inherently—and often extraordinarily—speculative.[40] Indeed, EPA's attempt to estimate the costs and benefits of the ozone and PM NAAQS at issue in this case, for informational purposes only (see note 36, *supra*), has itself become a source of debate.[41] Congress's decision to confine the use of cost-benefit techniques to implementation efforts, which typically involve assessment of near-term

[39] See, *e.g.*, L. Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 Yale L.J. 1981, 2044, 2065-2068 (1998); T. McGarity, *A Cost-Benefit State*, 50 Admin. L. Rev. 24-25 (1998); S. Shapiro & T. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 Duke L.J. 729, 732; H. Latin, *Good Science, Bad Regulation and Toxic Risk Assessment*, 5 Yale J. on Reg. 89, 92 (1988).

[40] See note 16, *supra*; see also, *e.g.*, W. Harrington, R. Morgenstern & P. Nelson, *On the Accuracy of Regulatory Cost Estimates*, Resources for the Future Discussion Paper 99-18, at 10 (1999); T. McGarity, *supra*, 50 Admin. L. Rev. at 7, 55, 76.

[41] ATA argues (ATA Br. 9-11) that EPA's RIA shows that costs exceed benefits. In fact, the RIA, which did not quantify many "nonmonetizable benefits categories" (ES-3, ES-15 to ES-16), estimated that the benefits of the revised PM standards would far outweigh their costs and that the costs and benefits of the revised ozone standard would be roughly commensurate. See ES-1 to ES-22; 13-2. The RIA necessarily had to rely on highly uncertain data. See ES-3 to ES-5. The fact that the parties do not agree on the conclusions that can be drawn from the economic analysis in this case illustrates the difficulties that ATA's position entails.

requirements for specific control measures on specific industries in specific locations, is entirely understandable.[42]

In any event, it is not for this Court to rescind Congress's legislative judgment on what is quintessentially a matter of public policy. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). Congress has made its policy determination, and "it is up to Congress, not this Court, to revise the determination if it so chooses." *United States* v. *Noland*, 517 U.S. 535, 541-542 n. 3 (1996).

III. EXPANDING THE RANGE OF FACTORS THAT EPA MAY CONSIDER IN SETTING NAAQS WOULD NEITHER RESOLVE NOR AVOID THE CONSTITUTIONAL ISSUE PERCEIVED BY THE COURT OF APPEALS

Perhaps ATA will address in its reply brief the question that it has presented in its cross-petition but fails to develop in its opening brief—whether this Court should interpret Section 109 as allowing consideration of "non-health factors" to "avoid confronting constitutional nondelegation issues" (ATA Br. i). Because we will have no opportunity to respond to ATA's reply brief, we address that matter in the first instance.

As we explain in the companion case, No. 99-1257, Section 109 is clearly constitutional under this Court's nondelegation doctrine jurisprudence. See 99-1257 Pet. Br. 22-26. Because

[42] In effect, Congress has defined the CAA's goals in terms of a public health and welfare objective, while recognizing the validity of the view of economists that "[e]conomic analysis can be useful in designing regulatory strategies that achieve a desired goal at the lowest possible cost." AEI-Brookings Amici Br. 10. EPA's Administrator has made that point in explaining why cost-benefit analysis is not appropriate in setting the NAAQS: "While cost-benefit analysis is a tool that can be helpful in developing strategies to *implement* our nation's air quality standards, we believe it is inappropriate for use to *set* the standards themselves." See *1997 Hearings* 282 (prepared testimony of Administrator Browner).

Congress has provided sufficient guidance "to meet any delegation doctrine attack," this Court has no occasion to give Section 109 a narrowing construction to avoid an alleged "serious question of unconstitutional delegation of legislative power." *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976).[43]

In any event, ATA's proposed construction would not solve the supposed constitutional infirmity under the nondelegation doctrine. To the contrary, it would actually grant EPA broader discretion than Section 109's plain language confers. See Scalia, *supra*, 24 Hous. L. Rev. at 102. Under ATA's suggested approach, EPA would have discretion to set NAAQS—and courts would be required to review them—based on an open-ended inquiry into any conceivable costs or benefits that might result from promulgation of the NAAQS. Contrary to the court of appeals' suppositions, Pet. App. 14a-18a, consideration of costs and other effects of implementation would not provide a "determinate criterion" for EPA in setting NAAQS.[44] Accordingly, while we do not disagree with the court of appeals' and ATA's implication

[43] The principle that a statute must be construed so as to avoid doubts as to its constitutionality applies only when the statute's meaning is unclear. See, *e.g.*, *Miller* v. *French*, 120 S. Ct. 2246, 2255 (2000). Here, Congress has made unmistakably clear its intent that EPA should base its NAAQS decisions solely on the health and welfare effects posed by the presence of the pollutant in the ambient air. See, *e.g.*, *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986) (the canon of constitutional doubt "does not give a court the prerogative to ignore the legislative will").

[44] Casting the NAAQS decision in cost-benefit terms would not resolve the underlying scientific uncertainties that EPA must face in setting NAAQS. See pp. 9, 11, *supra*. At the same time, it would introduce new uncertainties respecting the quantification of costs and benefits that would result from implementing the NAAQS. See pp. 45-47, *supra*. Economists readily admit that, in cases where information on costs and benefits is uncertain, "benefit-cost analysis cannot be used to prove that the economic benefits of a decision will exceed or fall short of costs." AEI-Brookings Inst. Amici Br. 9.

that Section 109 would not be unconstitutional if construed as ATA proposes, we believe that it follows *a fortiori* that Section 109 is also constitutional as it has been construed and applied throughout its 30-year existence.

In sum, Congress fulfilled its responsibility under the nondelegation doctrine and made the fundamental policy choice. Congress concluded that NAAQS should be set for criteria pollutants on the basis of what is necessary to protect public health and public welfare. Cf. *American Textile Mfrs.*, 452 U.S. at 509. Congress "itself determined that the economic effects of any necessary actions to meet the goals of [the NAAQS program] were acceptable." See NCAQ Report, *supra*, at 273; pp. 25-32, *supra*. It did not authorize EPA to set NAAQS on the basis of the agency's projection of compliance costs. Cf. *American Textile Mfrs.*, 452 U.S. at 545 (Rehnquist, C.J., dissenting) (health-based standards authorize an agency "to set exposure standards without regard to any kind of cost-benefit analysis"). ATA and its supporters can continue to ask Congress to reconsider that policy choice, notwithstanding the substantial benefits that the CAA has provided to the American public. See, *e.g.*, EPA, *The Benefits and Costs of the Clean Air Act, 1970 to 1990* (Oct. 1997). But unless and until Congress elects to change the law that has been in place since 1970, Congress's legislative judgment should be given effect.

CONCLUSION

This Court should affirm the court of appeals' ruling that the Clean Air Act requires EPA to establish NAAQS based solely on consideration of the effects on public health and public welfare caused by the presence of criteria pollutants in the ambient air.

Respectfully submitted.

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APPENDIX

Section 101 of the Clean Air Act provides in relevant part:

§ 7401. Congressional findings and declaration of purpose

* * * * *

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.

* * * * *

42 U.S.C. 7401.

Section 108 of the Clean Air Act provides in relevant part:

§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on–

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1) of this section, which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the Administrator information related to that required by paragraph (1).

(c) Review, modification, and reissuance of criteria or information

The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section. * * *

(d) Publication in Federal Register; availability of copies for general public

The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

* * * * *

42 U.S.C. 7408.

Section 109 of the Clean Air Act provides in relevant part:

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator–

(A) * * * shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such pro-

posed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

* * * * *

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

* * * * *

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such

new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also * * * (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

42 U.S.C. 7409.

Section 110 of the Clean Air Act provides in relevant part:

§ 7410 State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. * * *

(2) Each implementation plan * * * shall—

* * * * *

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with

respect to any such national primary or secondary ambient air quality standard * * *.

* * * * *

42 U.S.C. 7410.

(c) COMPUTATION OF DAMAGES.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) DEFENSE.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) LIMITATION.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

38

Supreme Court, U.S.
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No. 99-1426

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF CROSS-RESPONDENT AMERICAN LUNG ASSOCIATION

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting primary national ambient air quality standards, ignore all factors other than health effects relating to pollutants in the air.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

Respondent American Lung Association (ALA) was an intervenor in the court of appeals. ALA has no parent companies or nonwholly owned subsidiaries, and there is no parent or publicly held company owning 10% or more of ALA's stock.

The following were parties in one or both of the two consolidated proceedings addressed by this petition for certiorari (*American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1440 and consolidated cases; and *American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1441 and consolidated cases):

Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association)
American Farm Bureau Federation
American Forest & Paper Association
American Iron and Steel Institute
American Lung Association
American Petroleum Institute
American Portland Cement Alliance
American Public Power Association
American Road and Transportation Builders Association
American Trucking Associations, Inc.
Appalachian Power Company
Atlantic City Electric Company
Baltimore Gas and Electric Company
James Bassage
Burns Motor Freight, Inc.
Carolina Power & Light Company
Centerior Energy Corporation
Central and South West Services, Inc.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central Power and Light Company
Chamber of Commerce of the United States
Chemical Manufacturers Association
CINergy Corporation
Citizens for Balanced Transportation
Cleveland Electric Illuminating Company
Columbus Southern Power Company
ComEd Company
Consumers Energy Company
Dayton Power & Light Company
Delmarva Power & Light Company
Detroit Edison Company
Duke Energy Company
Duquesne Light Company
Edison Electric Institute
Equipment Manufacturers Institute
FirstEnergy Corporation (A merger of Centerior Energy Corporation and Ohio Edison Company)
Florida Power Corporation
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Judy's Bakery, Inc.
Kansas City Power & Light Company
Kennecott Energy and Coal Company
Kennecott Holdings Corporation

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Kennecott Services Company
Kentucky Power Company
Kentucky Utilities Company
Louisville Gas and Electric Company
Madison Gas and Electric Company
Commonwealth of Massachusetts
David Matusow
Brian McCarthy
Meridian Gold Company
State of Michigan
Midwest Ozone Group
Minnesota Power
Monongahela Power Company
Montaup Electric Company
National Association of Home Builders
National Association of Manufacturers
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
National Rural Electric Cooperative Association
National Small Business United
National Stone Association
Nevada Mining Association
State of New Jersey
Newmont Gold Company
Niagara Mohawk Power Corporation
Non-Ferrous Founders Society
Northern Indiana Public Service Company
Oglethorpe Power Corporation
State of Ohio
Ohio Edison Company
Ohio Mining and Reclamation Association

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Ohio Power Company
Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
Otter Tail Power Company
PacifiCorp
Pennsylvania Power & Light Company
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Edison Company, The
Potomac Electric Power Company
PP&L Resources
Public Service Company of New Mexico
Public Service Company of Oklahoma
Richard Romero
Salt River Project Agricultural Improvement and Power District
Small Business Survival Committee
South Carolina Electric & Gas Company
Southern Company
Southwestern Electric Power Company
Tampa Electric Company
Texas Gas Transmission Corporation
Toledo Edison Company
Union Electric Company
United Mine Workers of America, AFL-CIO
United States Environmental Protection Agency
Virginia Power
West Penn Power Company
West Texas Utilities Company
West Virginia Chamber of Commerce
State of West Virginia
Western Fuels Association
Wisconsin Electric Power Company

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GLOSSARY

ALA	American Lung Association
APC	Appalachian Power Company
ATA	American Trucking Associations, Inc.
CASAC	Clean Air Scientific Advisory Committee
CD	Criteria Document
EPA	Environmental Protection Agency
HEW	Department of Health, Education, and Welfare
JAO	Joint Appendix in D.C. Cir. No. 97-1441 (Ozone NAAQS)
JAPM	Joint Appendix in D.C. Cir. No. 97-1440 (Particulate Matter NAAQS)
NAAQS	National Ambient Air Quality Standards
NCAQ	National Commission on Air Quality
PM	particulate matter
ppm	parts per million
RIA	Regulatory Impact Analysis
SP	Staff Paper

STATEMENT OF THE CASE

I. EPA's 1997 NAAQS, AND THE COURT OF APPEALS DECISION.

The background of the Environmental Protection Agency (EPA) national ambient air quality standards (NAAQS) at issue in this case is set forth in American Lung Association's (ALA's) brief in No. 99-1257. In addition, the D.C. Circuit affirmed EPA's conclusion – based on step one of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) – that primary NAAQS must be based solely on health effects relating to pollutants in the air, not on compliance-related factors such as cost. App. 19a-21a.[1] *Accord, id.* 15a.

II. THE CLEAN AIR ACT.

The text, structure, and evolution of the Clean Air Act demonstrate that the 1970 Amendments precluded consideration of compliance-related factors in setting primary NAAQS, abandoning the contrary approach of the 1967 Act; that Congress reaffirmed the 1970 Amendments' approach in 1977, when it enacted a mandate for periodic review and revision of NAAQS; and that Congress declined to alter this approach when it enacted another comprehensive overhaul of the Act in 1990.

---

[1] Appendix citations refer to the appendix filed by the Environmental Protection Agency with its petition for certiorari. In addition, for purposes of brevity, this brief uses the phrase "compliance-related factors" to denote socioeconomic factors concerning compliance with NAAQS, including the cost and feasibility of compliance, and alleged health impacts associated with compliance.

A. Pre-1967 Enactments.

Eight years after authorizing the federal government to provide technical assistance to states and localities concerning air pollution control, Pub. L. No. 84-159, 69 Stat. 322-23 (July 14, 1955), Congress enacted the Clean Air Act of 1963. That statute authorized federal abatement of air pollution, but only in narrow circumstances and subject to numerous limitations – including the requirement that courts hearing abatement suits weigh "the practicability" and "physical and economic feasibility" of abatement. Pub. L. No. 88-206, § 5(a)-(g), 77 Stat. 396-98 (December 17, 1963).

In addition, the 1963 Act directed the Secretary of Health, Education, and Welfare (HEW), "[w]henever he determines that there is a particular air pollution agent (or combination of agents), present in the air in certain quantities, producing effects harmful to the health or welfare of persons," to "compile and publish criteria reflecting accurately the latest scientific knowledge useful in indicating the kind and extent of such effects which may be expected from the presence of such air pollution agent (or combination of agents) in the air in varying quantities." § 3(c)(2). The criteria were for "informational" rather than regulatory purposes. *Id.*

B. 1967 Act.

In 1967 Congress enacted a substantial overhaul of the Act, Pub. L. No. 90-148, 81 Stat. 485 (November 21, 1967), the "heart" of which was a mandate for establishment of air quality standards, which were to drive abatement efforts. § 108(c). *See* H. Rep. 728, 90th Cong., 1st Sess. 17 (1967) ("1967 H. Rep."). To lay the foundation for

establishment of standards, Congress directed the Secretary to generate two kinds of information.

Air quality criteria. First, Congress continued the 1963 Act's requirement for air quality criteria, and directed that the criteria be "requisite for the protection of the public health and welfare," and that they "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities." § 107(b)(1) and (2). They were to "include those variable factors which of themselves or in combination with other factors may alter the effects on public health and welfare of any subject agent or combination of agents, including, but not limited to, atmospheric conditions, and the types of air pollution agent or agents which, when present in the atmosphere, may interact with such subject agent or agents, to produce an adverse effect on public health and welfare." § 107(b)(3).

The drafters explained that criteria would include information about the health and welfare effects of air *pollution*, but not about the economic or technical impacts of pollution *control*. For example, the House Report noted that, "[u]nder the proposed legislation, air quality criteria are of much greater importance than they have been until now," and thus "[i]t is essential . . . that there be no confusion about the purpose" of such criteria. 1967 H. Rep. 16.

> They describe the effects that can be expected to occur whenever and wherever the ambient air level of a pollutant reaches or exceeds a specific figure for a specific time period. Thus, they define the health and welfare considerations

> that must be taken into account in the development of standards and regulations. *Economic and technical considerations have a place in the pattern of control activity but not in the development of criteria.* Air quality criteria should provide a clear statement of how well air pollution should be controlled in order to safeguard the public health and welfare, *economic and technical factors notwithstanding.*

Id. (emphasis added). The Senate Report was to the same effect:

> "Air quality criteria are an expression of the scientific knowledge of the relationship between various concentrations of pollutants in the air and their adverse effects on man, animals, vegetation, materials, visibility and so on." . . .
>
> An expression of scientific knowledge, the criteria indicate quantitatively and qualitatively the lowest known levels of exposure at which specific deleterious effects have been reported for a given pollutant or combination of pollutants. . . .
>
> The committee recognizes that criteria of ambient air quality which define health and welfare effects of air pollution *do not take into consideration the technological and economic feasibility of achieving such air quality.*

S. Rep. 403, 90th Cong., 1st Sess. 26-27 (1967) ("1967 S. Rep.") (emphasis added; citation omitted).

Control techniques information. To provide the economic and technological information that was lacking from the criteria, Congress established a new mandate that had not been part of the 1963 Act: it required the Secretary to issue

> information on those recommended control techniques the application of which is necessary

> to achieve levels of air quality set forth in criteria . . . , which information shall include technical data relating to the *technology and costs* of emission control, . . . [and] such data as are available on the latest available *technology and economic feasibility* of alternative methods of prevention and control of air contamination including *cost-effectiveness analyses.*

§ 107(c) (emphasis added). *See* 1967 H. Rep. 16-17 (discussing this requirement); 1967 S. Rep. 27-28 (same). *See also* 113 Cong. Rec. 19175/2 (1967) (Senator Randolph: "The economic and technological information which the Secretary must provide as a part of the recommended control techniques to accompany the criteria is expected to reflect the same careful study and preparation as do the medical and scientific data relating to air quality criteria.").

Air quality standards. Both criteria and control techniques information were to be issued "to the States," § 107(b)(1) and (c),[2] which were given primary responsibility for establishing air quality standards, HEW's standard-setting authority being limited to instances where a state failed to establish standards. § 108(c)(1) and (2). Whether established by the states or by HEW, standards were to be "consistent with the air quality criteria *and recommended control techniques.*" *Id.* (emphasis added).

In addition, the Act contemplated that standards would be "consistent with the purposes of this Act." § 108(c)(2). *Accord*, § 108(c)(1) (addressing revised standards). Among the purposes of the 1967 Act were "to protect and enhance the quality of the Nation's air

---

[2] In addition, control techniques information was to be issued to "appropriate air pollution control agencies." § 107(c).

resources so as to promote the public health and welfare and the productive capacity of its population." § 101(b)(1).

The House Report explained the standard-setting process:

> To warrant approval by the Secretary, air quality standards for a given class of pollutants must be consistent with the Secretary's air quality criteria *and control technology data* for those pollutants. This means, in the opinion of the committee, that such standards must call for air quality levels which, based on the Secretary's criteria, are at a minimum adequate for the protection of public health *and which can be achieved through the application of feasible control techniques*.

1967 H. Rep. 17-18 (emphasis added). *Accord, id.* 25.

The Senate committee emphasized that the air quality standards must be "consistent with the air quality criteria *and recommended control techniques*," and explained:

> An expression of public policy rather than scientific findings, their development from air quality criteria will be influenced not only by a concern for the protection of health or welfare, but also by *economic, social, and technological considerations*. The committee feels that under any circumstances protection of health should be considered a minimum requirement, and wherever possible standards should be established which enhance the quality of the environment.

1967 S. Rep. 28-29 (emphasis added).

C. 1970 Amendments.

Congress sharply changed course in the Clean Air Amendments of 1970, which were "a drastic remedy to

what was perceived as a serious and otherwise uncheckable problem of air pollution." *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976). *See also Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975) (under the pre-1970 Act, "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so;" the response of the States was "disappointing," and brought "little progress;" "Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970," which "sharply increased federal authority and responsibility in the continuing effort to combat air pollution.").

Senate Bill. In September 1970, the Senate reported a bill that became the basis for the 1970 Amendments. Far stronger than the previously reported House bill, the Senate bill not only required that HEW establish national ambient air quality standards for pollutants for which criteria had been issued, but also specified that those standards were to be "air quality standards the attainment and maintenance of which are necessary to protect the health of persons." S. Rep. 1196, 91st Cong., 2d Sess. 86 (1970) ("1970 S. Rep.") (§ 110(a)(3)). The committee report explained that standards must ensure "an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups," including "bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment." *Id.* 10. Within nine months of promulgation of air quality standards, states were to submit for the Secretary's approval implementation plans providing for

attainment of the air quality standards within three years of the plans' approval. *Id.* 86-87 (§ 111(a)(1) and (2)).[3]

The Senate bill contained no language allowing the Secretary to use compliance-related factors as a basis for limiting the health protection mandate of proposed § 110(a)(3). For example, there was no provision (as in the 1967 Act) that air quality standards must be consistent with control techniques information. Instead, "[t]he Committee recognize[d] that *the States* will continue to need this information to develop meaningful programs for *implementation* of ambient air quality standards on a regional basis." *Id.* 9 (emphasis added). *See also* 116 Cong. Rec. 32918/2 (1970) (Senator Cooper notes that, after NAAQS are promulgated, a control plan must be developed; "It is at *this* point that States and communities must make economic decisions, and decisions on the future growth of their areas and the kind of life they want, in considering alternative means of achieving clean air.") (emphasis added).

The legislative history makes clear that the exclusion of compliance-related factors from NAAQS-setting was a deliberate choice. "In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air

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[3] In addition to NAAQS, the Senate bill mandated national ambient air quality "goals," to be set at levels "necessary to protect the public health and welfare from any known or anticipated adverse effects associated with the presence of such air pollution agent or combination of such agents in the ambient air." 1970 S. Rep. 86 (§ 110(b)). The report explained that while NAAQS "are authorized because the Committee has recognized that protection of health is a national priority," goals were authorized because "man's natural and man-made *environment* must be preserved and protected." *Id.* 11 (emphasis added).

standards," but the committee determined that "the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible." 1970 S. Rep. 2. *Accord*, 116 Cong. Rec. 32901-02 (quoting 1967 Senate Report language admonishing that technological and economic factors "should not be used to mitigate against protection of the public health and welfare," 1967 S. Rep. 2, Senator Muskie states: "Contrary to this intent, these considerations have been used as arguments to compromise the public health. Therefore, the committee has made explicit in this bill what is implicit to standards designed to protect our health. That concept and that philosophy are behind every page of the proposed legislation."); 33115/1 (Senator Prouty: "for the first time, air quality standards will take precedence over objections of economic impracticality and technical impossibilities.").

Unlike the 1967 Act, which had primarily contemplated application of *existing* technology,[4] the Senate bill's mandate for health-based standards to be met in a fixed time frame was "expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible" – an approach that is known as "technology-

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[4] See 1967 H. Rep. 17-18 (quoted *supra* at 6); *id.* 13-14 (bill seeks to insure "that sources of air pollution will be controlled to the extent consistent with available knowledge of the adverse effects of pollutants on health and welfare and with *available* control technology") (emphasis added); 1967 S. Rep. 10 ("Strong regulatory programs are needed to insure full application of technological, *feasible, and economically reasonable* methods of control.") (emphasis added).

forcing." *See Union Electric*, 427 U.S. at 257. As Senator Muskie explained:

> The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do *what seems to be impossible* at the present time. But if health is to be protected, these challenges must be met.

116 Cong. Rec. 32901-02 (emphasis added). *Accord, id.* 32919/2 (Senator Cooper: "[T]he philosophy of the bill abandons the old assumption of requiring the use of only whatever technology is already proven and at hand and of permitting pollution to continue when it is not economically feasible to control it. The bill proceeds instead to set out what is to be achieved, and places its reliance on a great effort to develop technology, to train and put to work the manpower to accomplish that purpose, and it assumes a readiness by industry and the people or the country to pay the costs of pollution control."); 32902/1 (Senator Muskie notes that the bill's requirements "will be difficult to meet. But the committee is convinced that industry can make compliance with them possible or impossible. It is completely within their control. Industry has been presented with challenges in the past that seemed impossible to meet, but has made them possible.").

While expressing confidence in the ability of industry to meet these challenges, the drafters also indicated their awareness of the costs involved. 1970 S. Rep. 2 (the protection of public health will require "major action

throughout the Nation," including "major investments in new technology and new processes," and revised land use, transportation, and fuel policies; "Some facilities may be closed."); *id.* 3 ("existing sources of pollutants either should meet the standard of the law or be closed down"); *id.* 13 (recognizing that during the next several years, it will be "impossible" in many areas to attain NAAQS through motor vehicle tailpipe standards alone, but nonetheless stating that the committee "does not intend that these areas be exempt from meeting the standards;" instead, areas may need to institute transportation system changes and traffic control restrictions, which "may impose severe hardship").

These costs were considered justified by the urgent need to protect public health from air pollution: 116 Cong. Rec. 32903/3 (Senator Muskie: "We have been conscious, I think, since early June that what we were considering writing into law could result in drastic changes in the pattern of the life we live in the urban areas of America. We felt that just such changes were essential if we were really to come to grips with the problem of air pollution."); 1970 S. Rep. 1 (bill authorizes a "massive attack" on air pollution, which is "more severe, more pervasive, and growing at a more rapid rate than was generally believed"). *See also* 116 Cong. Rec. 32907/3 (Senator Boggs); 32918/1 (Senator Cooper); 32919/3 (Senator Spong); 33113/3 (Senator Young); 33114/2 (Senator Nelson); 33114/3 (Senator Prouty); 33118/1 (Senator Yarborough); *id.* (Senator McIntyre).

Conference Bill. The conference adopted the approach of the Senate bill, with certain modifications. Instead of "standards" and "goals," the conference bill

provided for "primary and secondary standards, the former relating to public health and the latter to public welfare." Conf. Rep. No. 1783, 91st Cong., 2d Sess. (1970), U.S. Code Cong. & Ad. News 5377 (1970). Several aspects of the final wording merit emphasis.

First, unlike either the House or Senate bills, the conference bill required both primary and secondary standards to be "based on" the air quality criteria issued under § 108. § 109(b)(1) and (2). This formulation represented a break with the 1967 Act, which had only required that standards be "consistent with" the criteria. 1967 Act § 108(c)(1) and (2).

Second, though revisions were made in the 1967 Act's provision prescribing the content of criteria, no language was inserted authorizing criteria to address economic or social considerations associated with pollution control. To the contrary, criteria were to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." § 108(a)(2) (emphasis added).[5]

Third, in addition to specifying what *future* air quality criteria were to contain, Congress also required the

[5] While "welfare" effects were statutorily defined to include "effects on economic values," § 302(h), no such definition imported economics into the statutory term "health." Moreover, even as to welfare, the "economic values" cognizable for NAAQS purposes were those related to "the presence of such pollutant in the ambient air." § 108(a)(2). *Accord*, § 109(b)(2). *See also* Pub. L. 101-549, § 109(b), 104 Stat. 2470 (Nov. 15, 1990) (amendment to § 302(h) further confirming that welfare effects relate to the presence of pollutants in the air).

setting of NAAQS based on *previously issued* criteria. These pre-existing criteria did not address compliance-related factors, and the short deadlines imposed by Congress (30 days for proposal of NAAQS, 90 additional days for promulgation) would not have allowed time for revision to include such factors. Indeed, far from expressing dissatisfaction with the absence of such factors from the criteria, Congress *deleted* the provision of the 1967 Act that required HEW to reexamine pre-existing criteria. *See* 1967 Act § 107(b)(1). *See also* 1970 S. Rep. 1 (noting that the previously issued criteria documents "increased" the committee's concern about public health impacts of pollution).

Fourth, instead of providing for the inclusion of compliance-related factors in criteria, Congress mandated (as had the 1967 Act) that such factors be addressed in control techniques information. § 108(b)(1) (control techniques information "shall include data relating to the technology and costs of emission control"). Of key importance, Congress *dropped* the 1967 Act's requirement that air quality standards be "consistent with" the control techniques information. In short, instead of being "consistent with the air quality criteria *and recommended control techniques*," 1967 Act § 108(c)(1) and (2) (emphasis added), standards were to be "based on . . . [the] *criteria*." 1970 Act § 109(b)(1) (emphasis added).

Fifth, because criteria were now to be used by EPA in setting NAAQS, while control techniques information was not, the conference (1) deleted the 1967 Act's provision that criteria be issued "to the States," § 108(a)(2) (EPA "shall *issue* air quality criteria") (emphasis added),

but (2) *retained* the 1967 Act's provision that control techniques information be issued "to the States and appropriate air pollution control agencies." § 108(b)(1). Thus, though no longer used to set air quality standards, control techniques information would continue to provide states information useful in planning compliance, *see* p. 8, *supra* (quoting 1970 Senate Report), as well as offering "advance warnings to industries or other sources of contamination of what will be expected of them." 1967 S. Rep. 27.[6]

Sixth, the 1967 Act's reference to "cost-effectiveness analyses" as a component of control techniques information (1967 Act § 107(c)) was dropped.

Seventh, Congress deleted the provisions of the 1967 Act (*see* p. 5, *supra*) that had required air quality standards to be "consistent with the *purposes*" of the Act.

Eighth, in addition to the § 108(b)(1) provision concerning control techniques information, the Act contains other provisions showing that Congress knew how to reference compliance-related factors when it wished to do so. For example, the 1970 Act retained a pre-existing provision mandating "a comprehensive study of the *economic impact* of air quality standards on the Nation's industries, communities, and other contributing sources of pollution, including an analysis of the national requirements for and the *cost* of controlling emissions to attain such standards of air quality as may be established pursuant to this Act." § 312(a) (emphasis added). Tellingly,

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[6] *Cf.* ATA Br. 40 (questioning why Congress would have required control techniques information to be made available contemporaneously with NAAQS-setting).

§ 109(b)(1) omitted any reference to such economic and cost analysis as a basis for NAAQS.

Moreover, the 1970 Act provided that primary NAAQS were to be attained within three years from approval of air pollution control plans, § 110(a)(2)(A)(i), but allowed for extensions if it could be shown that "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period." § 110(e)(1)(A). Likewise, other provisions of the 1970 Act expressly incorporated compliance-related factors. § 111(a)(1) (new source performance standards must provide for the degree of emission reduction that is "achievable," "taking into account the cost of achieving such reduction"); § 231(b) (aircraft emission standards shall take effect after such period as is necessary "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance").

Both houses of Congress approved the conference bill in December 1970, expressing their awareness of the far-reaching consequences of the legislation. 116 Cong. Rec. 42381/2 (Senator Muskie: a "tough" bill that faces the air pollution crisis with "urgency" and makes "hard choices"); 42393/2 (Senator Muskie: "the whole complex of residential patterns, employment patterns, and transportation patterns – the way in which people move about, go to their work, and live – . . . must be modified if the objective of clean air is to be achieved"); 42392/2 (Senator Randolph: "each and every person will be called on to pay the increased costs . . . associated with the achievement of an environment that, at a minimum, does not endanger public health"). *See also id.* 42384/3 (summary provided by Senator Muskie); 42393/1 (Senator Spong);

42394/2 (Senator Cooper); 42521/3 (Congressman Hechler); 42522/2 (Congressman Rogers); 42522-23 (Congressman Anderson); 42523/1 (Congressman Ryan); 42523-24 (Congressman Vanik).

D. Post-1970 Implementation.

Four months after enactment of the 1970 Act, EPA promulgated NAAQS for six pollutants. 36 Fed. Reg. 8187 (April 30, 1971), JAPM 245. In the preamble to that notice, EPA enunciated an interpretation from which the agency has not since wavered: specifically, that the Act "does not permit any factors other than health to be taken into account in setting the primary standards." *Id.* 8186/1, JAPM 244.

At oversight hearings in 1972, EPA presented a memorandum from its Office of General Counsel, which stated that "*except where specifically called for* in the Act, e.g., new source performance standards, *economic considerations are not to be the basis* for the Administrator's decisions. The national ambient air quality standards are set at levels necessary to protect the public health and welfare. The *cost or feasibility* of meeting these standards *was not a consideration.*" *Implementation of the Clean Air Act Amendments of 1970 – Part I,* Senate Hearing 92-H31 (February 16-23, 1972), at 312 (emphasis added). *Accord, id.* at 18-19 (Senator Eagleton, a conferee in the 1970 Act: "In respect to economic feasibility, it is clear again beyond any shadow of a doubt that Congress intended that this not be a factor insofar as the primary standards were concerned relating to public health."), 21 (similar statement by Senator Eagleton); *Implementation of the Clean Air Act – 1975,* Senate Hearing 94-H10 (April 22, 1975) ("1975 S. Hrg."), at 775-76 (in response to a witness's assertion that

the cost of pollution control should be taken into account in setting NAAQS, Senator Muskie stated that the drafters of the 1970 Act "decided that the only way to handle it that made any sense was public health," and quoted the 1970 Senate Report language calling for "an absence of adverse effect on the health of a statistically-related sampling [sic] of persons in sensitive groups from exposure to the ambient air").

E. The 1977 Amendments.

With the passage of the 1975 deadline for attainment of the primary NAAQS, many areas remained in violation – especially of the photochemical oxidants NAAQS, the predecessor to the current ozone NAAQS, which had been set at a level substantially more stringent than the 1997 ozone NAAQS challenged in the present case. *See* 36 Fed. Reg. 8187/3 (1971), JAPM 245 (0.08 ppm, averaged over *one* hour, not eight hours as in the 1997 NAAQS). Responding to the specter of substantial restrictions on industry, Congress revisited the Act.

Some – including at least one party to the present litigation – proposed that Congress's response should include allowing consideration of compliance-related factors in the setting of NAAQS. A Legislative History of the Clean Air Act Amendments of 1977 ("1977 LH") 4181-82 (Manufacturing Chemists Association, predecessor to the American Chemistry Council, proposed that § 109(b) be amended to "reflect the need to consider socioeconomic factors in the setting of standards"). *Accord, id.* 4190 (Dow Chemical). These proposals were made years *before* the D.C. Circuit first ruled, in *Lead Industries Assn. v. EPA,* 647 F.2d 1130, 1148-51 (D.C. Cir. 1980), that the Act bars consideration of such factors.

Congress did not, however, adopt these proposals. As explained by Senator Domenici, the 1970 Senate Committee had been "explicit" in ruling out consideration of technical feasibility in the setting of NAAQS, thus contemplating "a legislative blitzkrieg by the federal government that would roll over economic and technical difficulties." 1977 LH 4505-06. Nonetheless, the NAAQS were "one area of the law that the [1976 Senate] Committee refused to alter," *id.* 4507, and that refusal carried through to the final version of the 1977 Amendments.

Far from adopting the industry suggestions to inject compliance-related factors into NAAQS, Congress instead enacted a provision requiring EPA to review and revise NAAQS and criteria at no more than five-year intervals, applying the *pre-existing* mandates of §§ 109(b) and 108. § 109(d)(1) (EPA "shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 108 and subsection (b) of this section").

The drafters of § 109(d) were aware of the widespread nonattainment of the existing standards and the economic issues posed by that nonattainment. H. Rep. 294, 95th Cong., 1st Sess. 207-10 (1977) ("1977 H. Rep."). Indeed, they were specifically aware of the economic problems posed by failure to attain the 1971 photochemical oxidant NAAQS – which, as previously indicated, was substantially more stringent than the 1997 ozone NAAQS challenged here. *Id.* 509-14 (dissenting views of Congressman Krueger, *et al.*, noting that the photochemical oxidant standard had "uniformly and pervasively proved impossible of attainment," with 88% of monitored regions reporting exceedances, and that "[a] literal enforcement

of the Clean Air Act would permit no industrial development in nonattainment areas after the nonattainment date is passed"). The drafters were also aware of the 1971 NAAQS promulgation (in which EPA expressly stated that the Act does not permit primary NAAQS to be based on any factor other than health). *Id.* 180. In short, they were aware that, when EPA undertook to reexamine the existing photochemical oxidants NAAQS – the very NAAQS that was threatening widespread economic impacts in numerous areas – the agency's interpretation of § 109(b) would bar the agency from considering those impacts.

Finally, the drafters of § 109(d) were aware that, given the direction in which scientific knowledge was developing at that time, there was a substantial prospect that EPA would *tighten* the NAAQS, including the photochemical oxidant NAAQS. *Id.* 182 ("deficiencies and limitations of the national ambient air quality standards suggest that *greater not lesser* control of emissions are likely to be needed") (emphasis added); 127 ("all indicators point to the likely necessity for *tightening* the ambient air quality standards to protect public health") (emphasis added); 108-09 (quoting Johns Hopkins study on photochemical oxidants that found " 'the current standard of 0.08 ppm to have little margin of safety for susceptible populations (such as the elderly or chronically ill patient), and *thus a lower standard is justified* . . . [A] 1 hour standard of 0.06 ppm would appear to be appropriate.' ") (emphasis added by House committee); 109 (noting that the standard recommended by the Johns Hopkins study "would be 25 percent *more* stringent than the present standard") (emphasis added).

Yet, despite this awareness, the drafters included neither in the text of § 109(d) nor in their committee report indication of any intent to overturn EPA's interpretation of the Act and require consideration of compliance-related factors.

Indeed, the only place in § 109(d) where compliance-related factors are mentioned is in a provision requiring a scientific committee to advise EPA "of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." § 109(d)(2)(C)(iv). There is no authorization for EPA to override the terms of § 109(b) by considering such factors in deciding whether to revise NAAQS, nor does the legislative history indicate any such intent. To the contrary, the drafters indicated that the § 109(d)(2)(C)(iv) recommendations may be "of interest and assistance *to the States and to Congress* in fashioning future legislation." 1977 H. Rep. 183 (emphasis added). This provision for a scientific committee to issue *advice* on compliance-related factors stands in stark contrast to other provisions of the 1977 Amendments in which Congress showed that it knew how to authorize *regulations* to be based on such factors. *See, e.g.*, Pub. L. 95-95, § 126, 91 Stat. 730 (August 7, 1977) (adding § 157(b)) (authorizing promulgation of regulations to protect the stratospheric ozone layer, and providing: "Such regulations shall take into account the feasibility and the costs of achieving such control.").

"In an act with basically two working parts, standards and deadlines," Congress's refusal to weaken the NAAQS or the basis for setting NAAQS "left the deadlines as the major variable around which to structure . . . compromises." 1977 LH 4508 (Senator Domenici).

And indeed, Congress authorized extensions of NAAQS attainment deadlines, requiring that specified pollution control initiatives be undertaken during the extension period. Pub. L. 95-95, § 129(b), 91 Stat. 746-47 (August 7, 1977) (adding § 172(a), which authorized attainment deadlines to be extended to 1982, with a possible further extension to 1987).

Likewise, Congress authorized compliance deadlines for specific pollution sources to be extended until after the applicable NAAQS attainment deadline. Pub. L. 95-95, § 112(a), 91 Stat. 705-09 (adding § 113(d)). Discussing this provision, the House committee noted that the committee "t[ook] no issue" with this Court's holding in *Union Electric*. 1977 H. Rep. 56. There this Court had rejected the assertion that EPA was authorized to consider economic and technological feasibility in acting on state implementation plans: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." 427 U.S. at 257 n.5. The House committee – the *same* committee that drafted § 109(d) – indicated its agreement with this aspect of *Union Electric*:

> First, economic and technical feasibility may be considered, under the conditions *expressly provided for* in the statute, including under a DCO [delayed compliance order] application. Second and conversely, consideration of economic and technical factors in *other* contexts (i.e. in section 110 approvals, section 307(b) judicial review of such approvals, or in section 113 enforcement proceedings) is *not* authorized.

1977 H. Rep. 68 (emphasis added). As indicated previously, the drafters of § 109(d) included no language

"expressly provid[ing]" for the Administrator to consider compliance-related factors in NAAQS-setting.[7]

F. Post-1977 Developments.

The 1977 Amendments established a special commission which was to prepare a report concerning a broad range of issues raised by the Act, including the Act's economic effect. Pub. L. 95-95, § 313, 91 Stat. 785-88 (adding § 323; *see especially* § 323(b)(1)). In March 1981, the commission submitted a report – joined by three members of Congress (including the chair of the House committee with jurisdiction over the Act), as well as representatives of industry and state and local government. National Commission on Air Quality, To Breathe Clean Air (March 1981), at viii, iii. The report concluded that "[t]he statutory basis for setting national primary air quality standards does not take economic factors into account." *Id.* 70. *Accord, Executive Branch Review of Environmental Regulations*, Senate Hearing 96-H4 (Feb. 27, 1979) ("1979 S. Hrg."), at 343 (Senator Muskie: "The statute clearly prohibits the use of economic considerations in the setting of the health standards."); *id.* 251 (another

[7] The 1977 Amendments also included a new provision mandating "economic impact assessment" of certain enumerated Clean Air Act regulations. § 317, 42 U.S.C. § 7617. Even though this provision expressly clarified that "[n]othing in this section shall be construed to provide that the analysis of the factors specified in this subsection affects or alters the factors which the Administrator is required to consider" in taking the enumerated actions, Congress still declined to include the NAAQS among the covered provisions. *See* 1977 H. Rep. 51 (§ 317 applies to "*non-health-related* regulations") (emphasis added).

similar statement by Senator Muskie); *id.* 261 (Senator Bentsen noted that EPA's 1979 ozone NAAQS had not been influenced by economic considerations, and added: "I fully understand the statutory requirement that defines your decision-making process . . . . "); *Clean Air Act Oversight – Part 3*, Senate Hearing 97-H12 (June 9, 1981) ("6/1981 S. Hrg."), at 209 (Senator Gorton: "section 109 sets the primary standards at a level requisite to protect the public health with an educated margin of safety and which does not include cost benefit"); *Health Standards for Air Pollutants*, House Hearing 97-97 (October 14, 1981) ("1981 H. Hrg."), at 1 (Congressman Waxman: "[b]oth the agency and the courts have properly interpreted the Clean Air Act to forbid the consideration of costs in setting the health standards"); *id.* at 102 (Lester Lave – an amicus in the present case – indicated that Congress in 1970 "dismissed the relevance of abatement cost in setting the [NAAQS]"); *Use of Cost-Benefit Analysis by Regulatory Agencies*, House Hearing 96-157 (July 30, 1979), at 53 (Robert Crandall – an amicus in the present case – noted that "primary ambient air standards are to be set without regard to any measure of cost").

Having so found, the Commission recommended that "[t]he current statutory criteria and requirements for setting air quality standards at the levels necessary to protect public health without consideration of economic factors *should remain unchanged.*" NCAQ Report 55 (emphasis added). The Commission explained: "[I]f a national air quality standard were based in part on the costs of complying with it, the high costs of meeting the standard in a few heavily polluted areas could result in the standard's being set at a less protective level than is achievable in a reasonable, economic fashion in other

areas." *Id.* 70. At hearings held to address reauthorization, a number of legislators and witnesses likewise recommended against changing this aspect of the Act, citing ethical, scientific, and practical considerations. *See, e.g., Clean Air Act Oversight – Part 1*, Senate Hearing 97-H12 (April 9, 1981) ("4/1981 S. Hrg."), at 80 (former EPA Administrator Train), 82 (former EPA Administrator Costle); 6/1981 S. Hrg. 191 (Senator Stafford); 242-43 (Dr. Homer Boushey, assistant professor of medicine, University of California); 244-45 (David Hawkins, former Assistant Administrator for Air, EPA); 1981 H. Hrg. 22-23 (Marvin Schneiderman, Ph. D., senior science advisor, Clements Associates); 72-73, 75-83 (Nicholas Ashford, Ph. D., associate professor of technology and policy at MIT); 146-68, 200 (Douglas MacLean, research associate, Center for Philosophy and Public Policy, University of Maryland); *Reports of the Natl. Comm. on Air Quality and the Natl. Academy of Sciences*, Joint Hearing 97-6 (March 2, 1981) ("1981 Joint Hrg."), at 58-60 (Congressman Waxman).

Others – including parties and amici in this case – disagreed and urged Congress to amend the Act to allow consideration of compliance-related factors in NAAQS-setting. 6/1981 S. Hrg. 419-20 (Chemical Manufacturers Assn.), 199 (George Eads); 1981 H. Hrg. 86-87, 203 (Lester Lave).

After many years of deliberation, Congress enacted a major overhaul of the Clean Air Act in 1990. Recognizing that many areas had not attained the NAAQS by the extended deadlines in the 1977 Amendments (*i.e.*, 1982 and 1987), the 1990 Amendments authorized further extensions in attainment deadlines, with additional requirements for pollution control activities in the

interim. Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990). Congress also included a number of other provisions that expressly reference cost. For example, Congress amended § 312 to require analysis of (inter alia) "the *costs*, benefits and other effects associated with compliance with each standard issued for . . . a criteria air pollutant subject to a standard issued under section [109]." 42 U.S.C. § 7612(a) (emphasis added). And it amended the hazardous air pollutant provision of § 112 to provide for emission standards that offer "an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect." 42 U.S.C. § 7412(f)(2)(A) (emphasis added).

In contrast to these and other amendments authorizing consideration of compliance-related factors under other provisions of the Act, Congress made no amendments to § 109 – even though Congress was clearly aware that that provision had been construed as requiring primary NAAQS to be based only on health effects of pollutants in the air. S. Rep. 228, 101st Cong., 1st Sess. 5 (1989); H. Rep. 490, 101st Cong., 2d Sess. 145 (1990).

SUMMARY OF ARGUMENT

By mandating establishment of health-protective primary NAAQS based on air quality criteria that do not include consideration of compliance-related factors – and indeed by *deleting* from the Act a pre-existing provision requiring air quality standards to be consistent with

compliance cost information – the 1970 Amendments clearly expressed Congress's intent that compliance-related factors not be considered in establishing primary NAAQS.

In 1977, moreover, Congress enacted a mandate for periodic review and revision of NAAQS. Yet despite Congress's awareness of widespread socioeconomic impacts resulting from nonattainment of the NAAQS promulgated in 1971, and despite its belief that developing information on health effects could well result in *more* stringent NAAQS, Congress reaffirmed rather than changed the pre-existing mandate for health-protective NAAQS based on the air quality criteria.

The Court should decline ATA's invitation to overturn Congress's clearly expressed intent on policy grounds. Congress was entitled to write into law its policy preference that NAAQS accurately reflect health impacts of air pollution, and that compliance-related factors be considered at other points in the process – *e.g.*, by the states in determining how to comply with NAAQS, and by Congress in determining whether deadlines for attaining NAAQS should be extended. Indeed, a special commission established by the 1977 Amendments concluded in 1981 that this approach represents wise public policy and should not be changed – and it was *not* changed, even though Congress enacted another extensive overhaul of the Act in 1990.

Application of a presumption favoring consideration of costs should be rejected as simply another attempt to override Congress's clearly expressed intent that NAAQS-setting not encompass compliance-related factors. Indeed, the requested presumption directly contravenes this Court's holding in *Union Electric*, which

recognized that where Congress intended EPA to be concerned with economic and technological feasibility, it "expressly so provided." Unlike the generic, across-the-board presumption advocated by ATA, this holding was based on careful analysis of the specific language and structure of the Clean Air Act. The drafters of the periodic NAAQS review provision enacted in 1977 were aware of *Union Electric*, and expressed approval of that case's approach to construing the Act. Yet in enacting the periodic NAAQS review provision, they declined to "expressly . . . provide[ ]" for consideration of compliance-related factors.

The difficulty in establishing effects thresholds for air pollutants offers no basis for importing compliance-related factors into NAAQS. That difficulty was well-known to Congress in both 1970 and 1977, yet Congress established a mandate for promulgation and periodic review of primary NAAQS based solely on health effects of air pollutants. Moreover, the fact that an effects threshold has not been identified does not mean that scientific evidence documents adverse effects down to zero or background levels. Should such evidence develop in the future, it will be up to *Congress* to craft an appropriate response. In the meantime, EPA can appropriately set NAAQS based on the scientific evidence that exists, and can (as required by § 109(b)(1)) apply its "judgment" to set a "margin of safety" to compensate for uncertainties. While determining the size of such a margin will necessarily involve drawing distinctions of degree, this Court has recognized that such distinctions are an integral part of a civilized system of laws.

ARGUMENT

ATA concedes that, given the importance and centrality of the question whether compliance-related factors are to be considered in setting NAAQS, it is highly unlikely that Congress would have punted to EPA the discretion to answer this question – *i.e.*, that Congress would have left to the preferences of the agency whether to consider or ignore such factors. Specifically, ATA concedes that Congress did not *explicitly* delegate this power to EPA under *Chevron* Step One (*i.e.*, that Congress did not clearly express an intention that EPA can consider compliance-related factors or decline to consider them as the agency sees fit). ATA Br. 31 ("[i]t is highly unlikely that Congress would leave choices of such magnitude to an administrative agency") (internal quotations omitted). Likewise, ATA concedes that Congress did not *implicitly* delegate such discretion under *Chevron* Step Two (by failing to express a clear intention on the issue, thus implicitly delegating to EPA the discretion to consider or not consider compliance-related factors). *Id.* (recognizing the "implausibility of Congress's leaving a highly significant issue unaddressed") (internal quotations omitted).

In short, this case presents two competing *Chevron* Step One interpretations: did Congress clearly express an intent to *require* EPA to consider compliance-related factors, or did it clearly express an intent to *preclude* such consideration? The answer is clear: the latter is the only interpretation compatible with the text, structure, and evolution of the Act.

I. CONGRESS CLEARLY EXPRESSED ITS INTENT THAT PRIMARY NAAQS BE BASED ONLY ON HEALTH EFFECTS OF AIR POLLUTANTS.

1970 Amendments. Section 109(b)(1) requires that primary NAAQS be "requisite to protect the *public health*." (Emphasis added.) Moreover, the standards must be "based on" air quality "criteria," *id.*, which in turn "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on *public health* or welfare which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." § 108(a)(2) (emphasis added). Thus, the statute clearly provides that factors other than health effects of air pollutants have no place in the setting of primary NAAQS.[8]

This conclusion, clear enough on the face of §§ 109(b)(1) and 108(a)(2), is confirmed by other portions of the 1970 Amendments that show Congress knew how to expressly incorporate compliance-related factors when it wished to do so. *See* pp. 14-15, *supra* (citing examples). "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *Chicago v. Environmental Defense Fund*, 511 U.S.

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[8] The distinction between "health" and "welfare" in § 108(a)(2) matches a similar distinction in § 109(b) – specifically, between primary NAAQS to protect "health" and secondary NAAQS to protect "welfare." Thus, contrary to ATA's argument (ATA Br. 37-38), the portion of the criteria addressing "welfare" is not relevant to EPA's duty to set *primary* NAAQS addressing "health." And in any event, welfare effects cognizable under the statute, like health effects, are those relating to air pollutants – not to compliance costs. *See* p. 12 n.5, *supra*.

328, 338 (1994) (internal quotations omitted). Recognizing this principle, this Court has specifically held, in a decision construing the Clean Air Act: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Union Electric*, 427 U.S. at 257 n.5. Because Congress did not provide for compliance-related factors to be considered in setting primary NAAQS, EPA is not permitted to consider them.

Comparison of 1970 Amendments to their predecessors. "There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged." *United States v. Cong. of Industrial Orgs.*, 335 U.S. 106, 112 (1948). That comparison is especially informative here. First, the 1970 Amendments dropped the 1967 Act's requirement that air quality standards be consistent with the control techniques information and with the Act's purposes, requiring instead that the standards be "based on" the "criteria." *See* pp. 12-14, *supra*. Second, the 1970 Amendments dropped the 1967 Act's requirement that previously issued criteria be reexamined, directing instead that EPA proceed forthwith to issue NAAQS based on the then-existing criteria – which did not address compliance-related factors. *See* pp. 12-13, *supra*. These changes clearly demonstrate congressional intent that compliance-related factors be excluded from the setting of NAAQS. *See TVA v. Hill*, 437 U.S. 153, 185 (1978) ("The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies").

1970 Legislative History. The clear import of the statutory language is confirmed by the 1970 legislative history, which shows that Congress expressly intended to reject use of compliance-related factors in setting NAAQS; that it intended to establish health-based requirements that would challenge industry to develop new technologies; and that it believed the urgency of the air pollution problem required ambitious measures that would have far-reaching economic impacts. *See* pp. 7-16, *supra*.

1977 Amendments. The 1977 Amendments added a mandate for periodic review and revision of NAAQS. § 109(d). The drafters of that provision were aware both of the failure by numerous areas to attain the NAAQS by the 1975 deadline (and the serious economic issues raised by that failure), and of the rulemaking notice in which EPA had enunciated its interpretation of the Act as barring compliance-related factors from primary NAAQS-setting. They were also aware of this Court's decision in *Union Electric*, which held that where Congress intended EPA to be concerned with economic and technological feasibility, "it expressly so provided," 427 U.S. at 257 n.5 – indeed, the drafters explicitly noted their agreement with this approach to construing the Act. *See* p. 21, *supra*. Nonetheless, far from "expressly . . . provid[ing]" for EPA to consider compliance-related factors in NAAQS-setting, Congress required that new and revised NAAQS be consistent with the pre-existing mandate of § 109(b). § 109(d)(1). This provision stands in sharp contrast to other sections of the 1977 Amendments mandating that compliance-related factors be considered by EPA in developing regulations. *See* p. 20, *supra*. *See also* p. 29, *supra* (citing *Chicago*).

1990 Amendments. Though Congress was plainly aware of EPA's construction of the Act, the 1990 Amendments did not revise § 109 to "expressly . . . provide[ ]" for consideration of compliance-related factors – even though the Amendments included numerous other provisions addressing such factors. *See* p. 25, *supra*.

II. THE ACT'S "PUBLIC HEALTH" MANDATE DOES NOT ENCOMPASS INDIRECT HEALTH EFFECTS.

ATA's primary textual argument is that in moving from the 1967 Act's reference to "the health or welfare of any persons" to the 1970 Act's reference to "public health," Congress intended to sweep in alleged health effects associated with the cost of attaining air quality standards. ATA Br. 33-36; APC Br. 30-32. This argument overlooks § 109(b)(1)'s express requirement that NAAQS be "based on" criteria issued under § 108(a)(2). That latter section likewise uses the phrase "*public* health," (emphasis added), and clearly limits what *kinds* of effects are cognizable under that rubric: namely, effects "which may be expected *from the presence of such pollutant in the ambient air.*" (Emphasis added.). The socioeconomic effects that ATA cites result from compliance with NAAQS, not from pollutants in the air, and thus are not "public health" effects within the meaning of § 109(b)(1).

Indeed, the 1970 Congress's intent to preclude consideration of such effects is particularly clear given its *deletion* of the 1967 Act's provision that air quality standards be consistent with the control techniques information – information that expressly includes cost of compliance. *See* p. 13, *supra*. These 1967 Act provisions specifically addressing air quality standards (1967 Act § 108(c)(1) and (2)) furnish a more informative basis for

comparison than the general abatement language cited by ATA (1967 Act § 108(a), *cited in* ATA Br. 33).[9]

ATA's reading is also impossible to square with § 109(b)(1)'s mandate for NAAQS "the attainment and maintenance of which . . . are requisite to *protect* the public health." § 109(b)(1) (emphasis added). NAAQS can only address one thing: the concentrations of pollutants in the air. They cannot ensure better sanitation, improved access to medical care, better education in how to stay healthy, or other similar health-related socioeconomic goals. Thus, for example, if EPA relies on socioeconomic analysis as a ground for setting NAAQS less stringent than would be set based solely on health effects of air pollutants, those weaker NAAQS will not and cannot require that the resulting saved compliance costs be redirected by the regulated community to investments in public health programs. In short, if "public health" is defined in the broad manner advocated by ATA, promulgation of NAAQS that "protect" the public health would become impossible by definition.

Finally, ATA's argument represents a frontal attack on the technology-forcing mandate of the Act. *See* pp. 9-10, *supra* (describing Congress's technology-forcing intent).

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[9] In considering ATA's attempt to distinguish the health of "persons" from "public" health, it also bears emphasis that the 1970 Senate bill, which mandated NAAQS to protect "the health of persons," 1970 S. Rep. 86 (§ 110(a)(3)), was intended to require that NAAQS protect the "*public* health." *Id.* 2 (emphasis added). *Accord*, *id.* 9-11 (linking NAAQS to air quality criteria), 85 (§ 109(a)(2)) (requiring that criteria reflect "*public* health" effects) (emphasis added). The Senate committee's equating of the "health of persons" with "public health" further undercuts ATA's argument that the transition from one phrase to the other was intended to sweep in indirect health effects.

Under ATA's approach, EPA would base NAAQS on *before-the-fact* estimates of compliance costs (and resulting alleged health impacts). Such before-the-fact cost estimates, however, will necessarily reflect *today*'s technological knowledge, not tomorrow's – and will thus assign large (perhaps infinite) cost estimates to cleanup tasks for which known technology is nonexistent or unproven. The predicted high price tag will produce weaker NAAQS than would be set on the basis of health alone, resulting in more air-pollution-induced illness and death. By compromising health protection based on before-the-fact predictions that requirements cannot be met, EPA would be doing precisely what Congress foreclosed it from doing. *See* pp. 9-10, *supra*.

Aside from the inconsistency with congressional intent, basing NAAQS on before-the-fact compliance cost estimates makes no sense because such estimates are strongly biased towards overestimation. First, before-the-fact estimates cannot take account of future technological innovation, which in the past has produced compliance costs far lower than initially predicted. Second, even when technological innovation is not forthcoming, before-the-fact predictions will still overestimate compliance costs substantially, because they cannot forecast future congressional exemptions relieving industry of obligations it has been unable to meet. Thus, though Justice Powell's concurrence in *Union Electric* expressed concerns about the adverse health impacts that would flow from a shutdown of electric power generation, 427 U.S. at 272, a quarter-century later those fears have not been realized – not because all NAAQS have been attained, but because Congress has repeatedly granted extensions to avoid the adverse economic and social

impacts that might otherwise ensue. *See* pp. 21, 24-25, *supra*.

III. THE COURT SHOULD NOT OVERRIDE CONGRESS'S INTENT ON POLICY GROUNDS.

Unable to refute the strong evidence demonstrating Congress's intent that primary NAAQS be based solely on health effects of air pollutants, ATA resorts to public policy arguments, claiming that consideration of compliance-related factors would represent better regulatory policy. ATA Br. 47-50. But the proper role of the courts is to apply the law, not to formulate policy. *TVA v. Hill*, 437 U.S. at 194-95. ATA's arguments are especially ill-founded here, where Congress confronted and resolved that very policy issue in both 1970 and 1977. *See* pp. 6-22, *supra*. Moreover, after the 1977 Amendments Congress carefully considered yet again whether to amend the Act to allow consideration of compliance-related factors and declined to do so, after receiving a congressionally commissioned report (joined by members of Congress, industry, and state and local government) recommending *against* consideration of such factors, and after hearing from witnesses on both sides of the issue. *See* pp. 22-25, *supra*. Among those witnesses was Lester Lave, an amicus in this case, who recognized that if Congress were to accept his recommendation to allow consideration of compliance-related factors, "it *will certainly make the re-election of Congressmen more difficult* – which is why I am glad I am on this side of the table. But we will get better public policy and better public understanding." 1981 H. Hrg. 203 (emphasis added). Having failed to persuade their elected representatives to adopt their preferred approach, Dr. Lave and his allies now hope to have better success

with the unelected judiciary. That profoundly undemocratic approach to the making of public policy should be rejected.

Aside from being addressed to the wrong forum, ATA's policy arguments are misguided. As stated nearly twenty years ago by the Chairman of the House subcommittee with authority for the Act:

> The idea of using cost/benefit analysis to decide how much to protect public health is particularly dangerous. The protection of public health is the keystone of the Clean Air Act. For over a decade we have sought to protect particularly sensitive citizens such as children, the aged and asthmatics from polluted air. I don't think the American people would stand for abandoning these sensitive populations by misguided use of cost/benefit analysis.

1981 Joint Hrg. 58-59 (Congressman Waxman). *See* 1970 S. Rep. 10 (noting intent to protect "particularly sensitive citizens such as bronchial asthmatics and emphysematics"). Yet that is just what ATA proposes, arguing that the lives of the "weakest" victims of air pollution should be assigned a smaller monetary value, because they might have died soon anyway. ATA Br. 13, 19.

In addition to being inconsistent with congressional intent, such arguments raise profound moral and ethical issues. Indeed, when a witness told a House committee that air-pollution-induced mortality involved the "harvesting" of already weakened individuals, a Congressman responded that "I have heard of wheat harvest and corn harvest," but "this harvest of humans is just hard for me to take. . . . My goodness gracious, let us get away from that, not harvest our people." *Clean Air Act Oversight – 1973, Part 1*, House Hearing 93-62 (Sept. 10, 1973)

at 82-83 (Congressman Carter). *See also* 4/1981 S. Hrg. 94 (Senator Stafford: the Act embodies "the ethical principle that government should not condone levels of air pollution which are harmful to public health"); 1981 H. Hrg. 199 (Congressman Waxman: "Once you talk about a human being for sale, you have already taken and ascribed a different value to a human being than most of us would, by saying that a human life is an invaluable commodity."); 1975 S. Hrg. 774 (Senator Muskie: "[h]ow do you quantify in dollar terms health effects"?); 6/1981 S. Hrg. 243 (Senator Stafford: "it is hard to discover how much human life is worth"); *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) ("*Benzene*") (Rehnquist, J., dissenting) (the question whether human life should be balanced against economic costs presents "what has to be one of the most difficult issues that could confront a decisionmaker").

Congress has resolved these weighty issues by mandating primary NAAQS based on health effects of air pollutants. That decision should not be second-guessed by the judiciary.

ATA's policy argument also overlooks the structure of the Clean Air Act, which *does* consider compliance-related factors – but at the stage of achieving the NAAQS, not setting them. *See* pp. 8, 15, 20-21, 24-25, *supra*. *See also* 1977 H. Rep. 13 (nonattainment provisions of 1977 Amendments, which extended deadlines for attaining NAAQS, were "a means of *assuring realization* of the *dual* goals of attaining air quality standards and providing for new economic growth") (emphasis added); S. Rep. 127, 95th Cong., 1st Sess. 2-3 (1977) (responding to the "serious concern that achievement of air quality standards required to protect public health may impose unacceptable constraints on the Nation's capacity to achieve

the kind of economic activity necessary to bring about full employment and a balanced Federal budget," committee concluded that "more *time* was needed to achieve public health protection") (emphasis added).

Preserving health-based standards, while allowing more time to attain them where necessary, serves important policy goals:

> We prohibited the use of an economic test in setting health standards because we thought the public was entitled to know what the health requirements were.
>
> If we could not afford to be healthy, that is a second question, but we ought to at least know what was necessary to be healthy.

1979 S. Hrg. 343 (Senator Muskie). *Accord*, 6/1981 S. Hrg. 244-45 (David Hawkins, former Assistant Administrator of EPA for Air).

IV. THE COURT SHOULD NOT OVERRIDE CONGRESS'S INTENT BY PRESUMING THE RELEVANCE OF COMPLIANCE-RELATED FACTORS.

In an attempt to dress up its policy arguments in the garb of statutory construction, ATA asks the Court to adopt as a general rule of interpretation a *presumption* that costs may be considered, unless there is a "clear congressional intent" to preclude such consideration. ATA Br. 46 (citation omitted). Here, however, Congress *has* expressed a clear intent to limit primary NAAQS to health effects of air pollutants. *See* pp. 29-32, *supra*.

Moreover, ATA's requested presumption flies in the face of *Union Electric*: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." 427 U.S.

at 257 n.5. Unlike ATA's proposed presumption, that ruling was not an abstract across-the-board rule of construction designed to apply to statutes in general, but a conclusion based on careful analysis of congressional intent as revealed by *the Clean Air Act* in particular, which explicitly authorizes consideration of compliance-related factors in some provisions, but not in others. *See* pp. 12-15, *supra*. Moreover, the drafters of § 109(d) expressly indicated their acceptance of this aspect of *Union Electric*. *See* p. 21, *supra*. Under these circumstances, it would be especially inappropriate to override congressional intent with a policy-based presumption of the kind urged by ATA.

Indeed, a presumption of the kind advocated by ATA would be an unworkable approach to statutory interpretation. If the presumption were limited to costs, it would represent an unwarranted attempt to place a thumb on the scale of statutory interpretation by favoring some factors over others: why should courts presume the relevance of compliance costs, but not (for example) of health? If on the other hand the presumption were broadened to make cognizable *all* the "pros and cons" of agency action, ATA Br. 30 (citation omitted), the result would be an utterly unworkable presumption that every provision of every statute includes every factor that some litigant might consider relevant to an agency decision. Congress's ability to craft targeted statutory programs that operate in specified ways (for example, by providing for air quality standards to be set on the basis of health alone, and for costs to be considered in determining how to meet the standards and whether congressional extensions of attainment deadlines are warranted) would be compromised.

Finally, ATA's effort to justify its presumption on nondelegation grounds (ATA Br. 1) is meritless. The Act's NAAQS provisions pose no colorable nondelegation problem that could justify imposing a narrowing construction of the Act. ALA Br. in 99-1257 at 18-36. Moreover, ATA does not propose a narrowing construction of the Act, but rather a *widening* construction: instead of excluding factors from consideration so as to narrow the scope of the congressional delegation (as this Court did in *Natl. Cable Television Assn. v. United States*, 415 U.S. 336, 342-43 (1974)), ATA seeks to *expand* the breadth of the congressional delegation by *including* a wide range of factors beyond the health effects enumerated in the Act. *See* ATA Cross-Pet. 23 ("the key text of Section 109(b) rules in consideration of 'public health,' but fails to *rule out* consideration of anything") (emphasis in original).

V. NO EXEMPTION FROM THE ACT'S HEALTH-ONLY MANDATE IS AUTHORIZED FOR "NON-THRESHOLD" POLLUTANTS.

ATA argues that a health-only mandate should not apply because the pollutants at issue are "non-threshold." ATA Br. 25-26. This argument must be rejected. As previously shown, the Act clearly requires primary NAAQS to be based solely on health effects of air pollutants. Congress made no exemption from this mandate for "non-threshold" pollutants, and it is not the role of the judiciary to create such an exemption based on the argument that Congress "would have done so had it thought about it." *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 100 (1991).

Moreover, Congress clearly *did* think about this issue. It enacted the 1970 Act's health-only mandate after having been told by EPA's predecessor agency that "[t]o identify a no-known-effects level is something that would be, in my opinion, not only extremely difficult but very likely not possible." A Legislative History of the Clean Air Amendments of 1970 at 1184 (John Middleton of HEW). And in 1977 the drafters of § 109(d) wrote extensively concerning the likely absence of effects thresholds for various pollutants, 1977 H. Rep. 106-12, yet declined to authorize EPA to consider compliance-related factors in setting NAAQS. Subsequently, the difficulty in identifying effects thresholds was brought to Congress's attention again by those advocating consideration of compliance-related factors (including amici in the present case), *see, e.g.*, 1981 H. Hrg. 86 (Lester Lave), but Congress declined to include in the 1990 Amendments authorization to consider such factors.

ATA argues that in the case of "non-threshold" pollutants, a health-only mandate would result in standards set either at zero, or at a non-zero level chosen "arbitrarily." ATA Br. 29-30. This argument is meritless. Appalachian Power concedes that NAAQS must be set below the level at which "demonstrated adverse public health effects" occur. APC Br. 25. Identification of the level at which such effects occur is a health-only inquiry, and is not arbitrary: to the contrary, it is based on evaluation of scientific evidence concerning health effects to determine which effects have been demonstrated, and which of those demonstrated effects are adverse. 6/1981 S. Hrg. 240-41 (Dr. Homer Boushey, professor of medicine, testifies that if a health effect is defined as "a measurable change" in a health parameter, then identification of a

threshold may be difficult or impossible, but if the focus shifts to "adverse" effects, *i.e.*, "change that is likely to be associated with impairment of function or the development of symptoms, I think it is possible to identify a level where such an effect may occur with a high degree of probability in a portion of the population").

Second, identification of how far *below* the level of demonstrated adverse effects the standard should be set is likewise a health-only inquiry, pursuant to the Act's requirement to set an "adequate margin of safety" that is "based on" criteria addressing health effects of air pollutants. § 109(b)(1). The exact *amount* of the margin of safety cannot be reduced to a formula, and will necessarily depend on the Administrator's "judgment" (§ 109(b)(1)) concerning how much protection is warranted against effects that are less well-understood. *See* 1970 S. Rep. 10. That such a judgment may require distinctions of degree rather than of kind does not make it arbitrary. *Daniels v. Williams*, 474 U.S. 327, 334 (1986) (quoting with approval Justice Holmes: "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized.") (citation omitted).

Moreover, the fact that an effects threshold above zero may not have been identified does not necessarily mean that *scientific evidence* documents adverse effects down to zero or background levels. As the D.C. Circuit has recognized, "when a straight line extrapolation from *known* risks is used to estimate risks to health at levels of exposure *for which no data is available*," that "[t]his method, which is based upon the results of exposure at fairly *high* levels of the hazardous pollutants, will show some risk at every level because of the rules of arithmetic

rather than because of any knowledge." Natural Resources Defense Council v. USEPA, 824 F.2d 1146, 1165 (D.C. Cir. 1987) (emphasis added). Thus, if NAAQS are based on scientific evidence, and on margins of safety reasonably selected through assessment of scientific evidence and uncertainties in that evidence, they need not automatically be set at zero or background levels even for non-threshold pollutants.

It is possible that scientific knowledge concerning effects at lower pollutant concentrations may progress to the point where NAAQS at zero or background levels are the only available choice under § 109(b)(1). At that point, it will be for *Congress* to decide upon and enact an appropriate response – for example, by extending deadlines as it has done in the past, or by changing the paradigm of NAAQS decisionmaking. 4/1981 S. Hrg. 1 (Senator Stafford: "The Clean Air Act is not immutable. We have made changes in the original 1970 law as we have gained more knowledge about the effects of air pollution and the effects of the statute."). *Accord*, 6/1981 S. Hrg. 220 (Senator Randolph).

Finally, ATA's criticism of the alleged arbitrariness of § 109(b)(1) ignores the arbitrariness in ATA's own suggested approach. Far from being a determinate process, cost-benefit analysis involves many value judgments – in deciding how to assign quantitative values,[10] as well as how to weigh non-quantified factors. *See* AEI-Brookings

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[10] For example, how much are human life and health worth? *See* pp. 36-37, *supra*. How much future technological innovation will occur, thus driving down compliance costs? *See* pp. 9-10, *supra*. *See also* 1981 H. Hrg. 27 (Marvin Schneiderman: cost-benefit analysis "is very sensitive to some strictly technical and arbitrary issues" such as the choice of a discount rate).

Br. 10 (stressing importance of weighing "equity" and other "qualitative" factors "that are not easily quantified or monetized"). A health-only inquiry involves fewer variables, and thus fewer opportunities for arbitrary decisionmaking, than ATA's approach, which would open up EPA's deliberations to anything that might be considered a "pro[ ]" or a "con[ ]" of a NAAQS. *See* ATA Br. 30. *See also Benzene*, 448 U.S. at 682 (Rehnquist, J., dissenting) ("If § 6(b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards *for any reason whatsoever*, including even political feasibility.") (emphasis added).

VI. EPA'S 1997 NAAQS ARE SUPPORTED BY COMPELLING EVIDENCE OF ADVERSE HEALTH EFFECTS.

ATA casts aspersions on the evidentiary underpinnings of EPA's 1997 NAAQS. ATA Br. 6-7, 12-14; APC Br. 10-13. Aside from being irrelevant to the *statutory* issue raised by ATA's petition, these arguments are meritless.

The evidentiary background for EPA's 1997 NAAQS is explained in ALA's brief in No. 99-1257. Several points deserve emphasis here. First, the suggestion that the effects documented by EPA do not constitute demonstrated adverse public health effects simply because they do not rise to the dire severity of the London Killer Fog (APC Br. 25) must be rejected. Over thirty years ago, Congress criticized "the false impression that air pollution is a health hazard only when unusual weather conditions conspire to produce localized disasters. . . . The subtler, less dramatic long-range effects of air pollution

are of much more serious consequence to the population as a whole." 1967 H. Rep. 4-5. *Accord*, 1967 S. Rep. 9.

Second, the notion that EPA is "regulat[ing] air pollution to ever more stringent levels" (APC Br. 2) not previously foreseen ignores a simple reality: the 1997 ozone NAAQS (0.08 ppm, eight-hour average) regulates to substantially *less* stringent levels than the 1971 photochemical oxidants NAAQS (0.08 ppm, *one*-hour average). Indeed, the drafters of § 109(d) noted without protest that the 1971 photochemical oxidants NAAQS might need to be revised to regulate even *more* stringent levels. 1977 H. Rep. 108-09. In short, the argument that EPA's substantially *less* stringent 1997 NAAQS strayed below the pollution levels of concern to Congress is simply unsustainable.

PM NAAQS. With respect to the PM NAAQS, industry has not disputed the adverse nature of the public health effects at issue (*e.g.*, death, hospitalization, respiratory illness, and missed work and school days), *see* 62 Fed. Reg. 38657/1 (1997), JAPM 7, but instead has challenged EPA's reliance on epidemiological studies, which do not demonstrate a biological mechanism through which PM causes adverse effects. ATA Br. 13. The D.C. Circuit resoundingly rejected this argument, App. 55a-56a, and with good reason. Congress recognized that epidemiological studies are one of "four types of evidence which link air pollution to specific health detriment," 1967 S. Rep. 9, *accord*, 1967 H. Rep. 3, and indeed has directed EPA to "conduct studies, including *epidemiological*, clinical, and laboratory and field studies, as necessary to identify and evaluate exposure to and effects of air pollutants on human health." 42 U.S.C. § 7403(d)(1)(A) (emphasis added). *See also* 6/1981 S. Hrg.

194 (Dr. Norton Nelson, professor of environmental medicine: "The *most directly relevant data* is epidemiological data," because it "deals with humans, not rats or mice") (emphasis added).

The epidemiological database available to EPA amply justified establishment of a fine particle NAAQS to protect against adverse public health effects occurring at particulate concentrations allowed by the prior NAAQS. In contrast to, for example, the 1971 photochemical oxidant NAAQS, which was based on a *single* epidemiological study,[11] the 1997 PM NAAQS was based on "[o]ver 60" such studies that "found consistent, positive, significant associations between short-term PM levels and mortality and morbidity endpoints." SP V-54, JAPM 2011. And in sharp contrast to the six sentences that represented EPA's entire explanation of the 1971 PM NAAQS, 36 Fed. Reg. 1502/2 (1971), JAPM 260, EPA provided thorough and detailed analysis that convinced all four of CASAC's epidemiologists of the need for new NAAQS addressing fine particles, the particle fraction most clearly identified with the effects. Wolff 6/13/96 Ltr., Table 1, JAPM 3165. Three of those epidemiologists concluded:

> EPA has appropriately synthesized this evidence and drawn a responsible public health conclusion, namely, that particulate concentrations *at current levels* are causally associated with excess mortality and morbidity. Furthermore, we agree that *fine* particulates, as currently indexed by PM2.5, are the most appropriate indicator for

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[11] 36 Fed. Reg. 8186/2 (1971), JAO 3539; 43 Fed. Reg. 26962/2-3, 26965 (table) (1978), JAO 3516, 3519.

> the component of the particulate air mass to which these adverse effects are attributed.

Lippmann 3/20/96 Ltr 7, JAPM 3159 (emphasis added).

EPA's issuance of a fine particle NAAQS not only responds to compelling scientific evidence, but also fulfills the promise EPA made decades ago, when it told Congress that the 1971 PM NAAQS "was promulgated with the full understanding and intention that later ambient air quality standards for specific fractions or components of the total suspended particulate would be necessary." 1975 S. Hrg. 755 (Dr. John Knelson, Director, EPA Human Studies Laboratory). Indeed, the drafters of 109(d) expressly directed EPA's attention to testimony that, because the 1971 PM standard "fail[ed] to differentiate between large particulate that results from blowing dust and the much finer particulate that results from human activity," it allowed "many heavily industrialized, obviously 'polluted' urban areas [to] meet the standard." *Clean Air Act Oversight – 1973, Part 2*, House Hearing 93-63 (Sept. 1973), at 826 (Texas Air Control Board), *cited in* 1977 H. Rep. 182.

EPA's fine particle standard is designed to provide improved public health protection against such pollution. Far from protecting just a few scattered individuals, it is one of the most important public health regulations of our time, holding out the promise of preventing thousands of deaths, tens of thousands of hospital admissions and respiratory illnesses, and millions of days of missed work and restricted activity each year. *See* RIA 12-43, JAPM 3486.

Ozone NAAQS. With respect to the ozone NAAQS, the evidence demonstrating adverse public health effects is likewise compelling. First, human clinical studies were

conducted on volunteers, who were dosed with specified concentrations of ozone for specified periods. Those studies showed that, after 6.6 hours of exposure to 0.08 ppm ozone, 10% of the subjects had drops in lung function of 20% or more – with individual decreases ranging as high as 37.9%. ALA Br. in 99-1257 at 8.

EPA expressly found that the effects of 0.08 ppm ozone are adverse for sensitive individuals. 62 Fed. Reg. 38864/1, JAO 9. EPA's conclusion that adverse effects were experienced by "some" of the clinical study participants at 0.08 ppm, *id.*, even if interpreted extremely cautiously as encompassing only relatively few of the sixty individuals participating in the two key prolonged exposure studies at that level,[12] would still mean that a significant percentage of exposed individuals can be expected to experience adverse effects at 0.08 ppm. Moreover, because the individuals tested in these studies were all healthy young adults,[13] these results understate the likely impact on sensitive populations such as asthmatics. CD 9-26, JAO 1767 ("The magnitude of individual changes can become more important in persons with impaired respiratory systems (*e.g.*, asthmatics) who already have reduced baseline lung function."). Extrapolated to the national population, the clinical studies belie any suggestion that ozone's adverse effects strike only a few scattered individuals.

In addition to the human clinical data, epidemiological evidence demonstrated increased hospital admissions and emergency room visits for respiratory causes at

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[12] *See* CD 7-58 Fig. 7-4, JAO 1515 (60 individuals tested at 0.08 ppm, 6.6-hour duration).

[13] *See* CD 7-54, JAO 1511 (Horstman and McDonnell).

ozone levels allowed by the prior NAAQS. 62 Fed. Reg. 38864/1, JAO 9. For each ozone-induced hospital admission, moreover, there are far larger numbers of other ozone-induced health effects including asthma attacks and visits to doctors and outpatient facilities. *Id.* 38868/1, JAO 13. It is scant consolation to the stricken individuals that some of these adverse health effects may be "transient and reversible." ATA Br. 6. *See* 6/1981 S. Hrg. 233 (Dr. Boushey: "most attacks of asthma" are reversible, but "no physician or lay person who has witnessed the distress of an asthmatic attack could fail to recognize it as an adverse health effect"). *See also* ALA Br. in 99-1257 at 7-8 (victims describe asthma attacks); 44 Fed. Reg. 8207/3 (1979), JAO 3485 ("Even when reversible, respiratory symptoms may restrict normal activity or limit the performance of tasks.").

Unable to refute the scientific evidence documenting adverse effects from ozone exposure at concentrations allowed by the prior NAAQS, industry is left with critiques of EPA's risk assessments, which attempted to gauge how many individuals would come into contact with various ozone levels. APC Br. 11-12. But EPA determined in this rulemaking, based on cogent scientific evidence, that a significant percentage of the population experiences adverse health effects at ozone levels permitted by the prior standard. EPA was not required to deny public health protection based on a prediction of the size of the affected groups or the frequency with which they will come into contact with polluted air. People who currently pursue or may in the future need or want to pursue multi-hour outdoor exercise – whether they are children at camp, construction workers, landscapers, or letter-carriers – are entitled to do so without fear of ozone-induced respiratory impairment. *See, e.g.*, 1970 S.

Rep. 10 (NAAQS must protect sensitive citizens "who in the normal course of daily activity are exposed to the ambient environment"), 36 ("Recommendations that children not run to and from school and that events be suspended are not a substitute for reducing pollution."); 44 Fed. Reg. 8210/1 (1979), JAO 3488 ("Standards must be based on a judgment of a safe air quality level and *not on an estimate of how many persons will intersect given concentration levels*. EPA interprets the Clean Air Act as providing citizens the opportunity to pursue their normal activities in a healthy environment.") (emphasis added).

Finally, as to both PM and ozone, it bears emphasis that this case (unlike *Benzene*) does not present a situation where an agency has regulated at pollutant levels an order of magnitude below the range where adverse effects are demonstrated. To the contrary, as shown above and in ALA's brief in No. 99-1257 (at 34-35), the scientific evidence documents adverse health effects in the range where both the PM and ozone NAAQS were set.

CONCLUSION

For the foregoing reasons, the Court should affirm the D.C. Circuit's conclusion that primary NAAQS must be based solely on health effects of air pollutants.

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Cross-Petitioners

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents

On Writ of Certiorari to
The United States Court of Appeals
For the District of Columbia Circuit

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QUESTION PRESENTED

Whether the court of appeals properly reaffirmed the longstanding principle that, in setting and revising National Ambient Air Quality Standards under Section 109 of the Clean Air Act, the Environmental Protection Agency may not consider the costs of implementing measures to attain the standards.

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BRIEF FOR RESPONDENTS MASSACHUSETTS AND NEW JERSEY

Both this case and *Browner v. American Trucking Associations, Inc.*, No. 99-1257, to be heard in tandem, arise out of challenges brought by cross-petitioners to the EPA's promulgation of revised National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) and ozone. Both cases, moreover, concern the validity of EPA's construction of the Clean Air Act that underlies the revised PM and ozone NAAQS. In No. 99-1257, cross-petitioners (filing there as respondents) contend that EPA's construction of the Clean Air Act violates the nondelegation doctrine. In this case, cross-petitioners contend that the Clean Air Act itself bars EPA's longstanding position that the statute precludes the agency from considering costs in setting the NAAQS.

Cross-petitioners seek to link the two cases by claiming that the source of the Clean Air Act's constitutional infirmity is EPA's refusal to interpret the Act to allow for the consideration of costs in setting the NAAQS. Cross-petitioners thus attempt to persuade this Court to reject EPA's interpretation of the Act by invoking the canon that courts should construe statutes so as to avoid invalidating them on constitutional grounds.

In our brief filed in No. 99-1257, however, we have established the absence of any merit to cross-petitioners' claim of undue delegation. Brief of Respondents Massachusetts and New Jersey, *Browner v. American Trucking Assns.*, at 20-24 (MA & NJ Br.). Because cross-petitioners have so closely linked their statutory argument in this case to their constitutional argument in No. 99-1257, the former should fall based on the weakness of the latter. A wholly insubstantial constitutional argument can never be a legitimate basis for rejecting an otherwise valid agency statutory interpretation. But that is especially so where, as in this case, cross-petitioners' proffered interpretation would not avoid the constitutional problem as they see it.

There are, moreover, no other possible bases for upsetting

EPA's unbroken position that the Clean Air Act allows both EPA and the States to consider costs in implementing the NAAQS, but does not allow EPA to consider costs in setting the NAAQS in the first instance. The plain meaning of the statutory language permits no other conclusion. And, contrary to the gloomy exaggerations of cross-petitioners and their supporters, the many decades of federal air pollution regulation confirm the wisdom of Congress's deliberate and carefully crafted choices about precisely how costs should be considered in protecting the quality of the nation's air.

STATEMENT

A. Statutory and Regulatory Background

The NAAQS form the centerpiece of the Clean Air Act. They protect public health by governing the quality of the nation's outdoor air. These standards are not, however, self-implementing; they do not themselves directly apply to any source of air pollution. They apply instead directly only to those federal and state governmental authorities responsible for ensuring that the standards are met. For that reason, while the NAAQS are "standards" in name, they are more akin to statutory policy objectives in their actual operation.

Federal and state authorities are statutorily obliged to develop a series of implementing measures designed to achieve compliance with the NAAQS. The Clean Air Act itself mandates some of those implementing measures and their respective timetables. The design and application of other implementing measures are left to the discretion of the appropriate federal or state governmental authority.

A fundamental distinction between the statutory factors relevant to the *setting* of a NAAQS and the statutory factors relevant to *implementing* measures designed to achieve a NAAQS is central to the operation of the Act. Congress deliberately and carefully decided to apply different

requirements to the very different regulatory tasks of setting regulatory objectives and designing implementing measures. In particular, Congress concluded that while costs and related practicality and feasibility concerns should be considered in a variety of ways in implementing the NAAQS, they should not be considered in setting them.

During the last three decades of experience with the Clean Air Act, Congress has steadfastly maintained that essential distinction. Congress has repeatedly amended the Act in both isolated and more sweeping ways to provide for more or less consideration of costs and feasibility in aspects of the statute concerned with implementation of the NAAQS. These changes sometimes reflect congressional response to new knowledge and, other times, simply to changing political priorities. Yet, throughout these same thirty years, many of which were marked by considerable controversy over the costs of environmental protection, Congress has not once altered the basic format for setting the NAAQS, a format that from the very beginning has excluded the consideration of costs.

1. Setting the NAAQS

Sections 108 and 109 of the Clean Air Act require the Administrator of EPA to establish and periodically revise NAAQS for a limited subset of air pollutants. *See* 42 U.S.C. 7408-7409. Section 108 provides that NAAQS may be set only for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." *See* 42 U.S.C. 7408(a)(1)(A)-(B). Accordingly, the Administrator may regulate a pollutant under the NAAQS program only if she first finds that its widespread presence in the ambient air poses a threat to public health or welfare.

The Clean Air Act provides for the establishment of both "primary" and "secondary" NAAQS. The essential distinction

between the two is that primary NAAQS "protect the *public health*" while secondary NAAQS "protect the *public welfare*." More particularly, Section 109(b)(1) of the Act defines the primary NAAQS as:

> ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, *based on such criteria* and allowing an adequate margin of safety, are requisite to protect the public health.

42 U.S.C. 7409(b)(1) (emphasis added). A secondary NAAQS is defined as:

> a level of air quality the attainment and maintenance of which in the judgment of the Administrator, *based on such criteria*, is requisite to protect the public welfare from any known or anticipated effects associated with the presence of such air pollutant in the ambient air.

42 U.S.C. 7409(b)(2) (emphasis added). For each standard, therefore, the Act directs the Administrator to exercise her "judgment" based on specific "criteria" with the added requirement for primary NAAQS that the Administrator also allow for "an adequate margin of safety."

Section 108(a)(2) further details the precise content of the air quality "criteria" on which the NAAQS must be based. These criteria must:

> reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health and welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.

42 U.S.C. 7408(a)(2). Thus, the only "effects" that are relevant under the prescribed criteria are those expected from the pollutant's "presence . . . in the ambient air."

Finally, Section 109(d)(1) of the Clean Air Act directs the Administrator to review the criteria and NAAQS every five years. 42 U.S.C. 7409(d)(1). Based on this review, the Administrator may promulgate a new NAAQS or revise an

existing one. 42 U.S.C. 7409(a)(1). The criteria relevant to the decisions whether and how to revise an existing NAAQS are the same as the criteria, described in section 108, for establishing a NAAQS in the first instance. *Id.*

2. Implementing the NAAQS

A NAAQS does not, standing alone, directly regulate any source of air pollution. It instead simply establishes a statutory objective that the Clean Air Act makes federal and state governmental regulatory authorities responsible for achieving within a series of prescribed timetables. Hence, while Sections 108 and 109 govern the *setting* of NAAQS, including their subsequent revision, other Clean Air Act statutory provisions govern the *implementation* of the NAAQS.

Section 110 of the Act, for instance, provides for the development by states and, if necessary, by the federal government, of state or federal "implementation plans" (SIPs or FIPs) that provide for the "implementation, maintenance, and enforcement" of NAAQS throughout each state. 42 U.S.C. 7410(a)(1). While section 110 details a host of requirements for these plans, including the control of stationary sources "as necessary to assure that [NAAQS] are achieved[,]"[1] the overarching requirement is that the implementation plan, as a whole, make the necessary progress toward NAAQS compliance. "Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires, . . . and industries with particular economic or technological problems may seek special treatment in the plan itself." *Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1975).

Other provisions of the Clean Air Act specifically concerned

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[1] 42 U.S.C. 7410(a)(2)(C).

with implementation, moreover, expressly provide for the consideration of costs. For instance, section 111 provides for EPA's promulgation of technology-based standards of performance applicable to new stationary sources of air pollutants, including pollutants governed by the NAAQS. Those performance standards must "tak[e] into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements." 42 U.S.C. 7411(a). Federal emissions standards applicable to mobile sources and aircraft, many of which emit NAAQS pollutants, likewise mandate taking costs into account. *See* 42 U.S.C. 7521(a)(3)(A)(i); 42 U.S.C. 7571(b).

The nonattainment provisions of the Clean Air Act, which apply to those parts of the nation not yet in attainment with NAAQS, similarly reflect significant attention to costs and technological feasibility. The touchstone for "nonattainment plans" designed to achieve the NAAQS is "reasonableness" in the form of "reasonable further progress" towards attaining the NAAQS. 42 U.S.C. 7501(1), 42 U.S.C. 7502(c)(2). The Act does not require the immediate attainment of the NAAQS, regardless of the economic costs of such a requirement, notwithstanding the passage long ago of previous statutory deadlines. Nonattainment plans must instead provide for "reasonably available control measures" and new and modified major stationary sources must, among other things, achieve the "lowest achievable emission rate," which explicitly excludes limitations "that are not achievable." 42 U.S.C. 7502(c)(1), 7503(a)(2), 7501(3)(A). The Act also allows EPA to construe the term "source" for the purposes of these nonattainment requirements to allow a facility to avoid costlier controls by reducing air pollution in one part of a manufacturing site more than it increases pollution in another part of the site. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984).

3. History of the Clean Air Act and NAAQS Program

The Clean Air Act today embodies no fewer than eleven separate Acts of Congress, stretching back over fifty years.[2] A central part of the legislative debates surrounding each of these enactments has been the extent to which regulatory objectives should turn on public health and welfare concerns as well as the extent to which the regulatory means of achieving those objectives should turn on considerations of economic cost or technological feasibility. With regard to implementation, Congress has made numerous extremely precise and significant refinements in the statutory language relating to where, when, and to what extent costs should be relevant in establishing pollution control requirements applicable to individual sources of air pollution. By contrast, Congress has, for three decades, steadfastly adhered to the fundamental position, reflected in sections 108 and 109 of the Clean Air Act, that any such cost considerations should not similarly play any role in the setting of the air quality criteria and standards that have always served as the objectives of federal air pollution legislation.

Congress first addressed the question of what "criteria" should be relevant to setting air quality standards in the original 1963 Clean Air Act.[3] The 1963 statute authorized the federal government-acting through the Secretary of the Department of Health, Education, and Welfare (HEW)-to establish "criteria" for air quality. 77 Stat. 392 § 3(c)(2). The language describing the scope and content of the original air quality criteria is strikingly similar to the corresponding language of the Clean Air Act today.[4] Although Congress used

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[2]*See* William H. Rodgers, *Environmental Law* 124 (2d ed. 1994).

[3]*See* Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392.

[4]The statute provided:

> Whenever [the Secretary] determines that there is a particular air

the same term, "criteria," for both the scientific *information* on the consequences of air pollution and *standards* for air quality,[5] the goal of the standards was clear: the Secretary was to recommend to local, state, or interstate air pollution control agencies those standards which "in [the Secretary's] judgment may be necessary to protect the public health and welfare."[6]

In the Air Quality Act of 1967, Congress used language virtually identical to that in the 1963 Act in again directing the Secretary of HEW to establish air quality criteria.[7] The 1967 Act also introduced some of the language that now governs the NAAQS themselves: the Act directed the Secretary to issue "such criteria of air quality as in his judgment may be requisite for the protection of the public health and welfare."[8] Nevertheless, Congress continued to rely mostly on the states for the development of rules governing air quality (standards) while relying on the federal government for the development of the scientific documents on which the standards were to

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> pollution agent (or combination of agents), present in the air in certain quantities, producing effects harmful to the health or welfare of persons, the Secretary shall compile and publish criteria reflecting accurately the latest scientific knowledge useful in indicating the kind and extent of such effects which may be expected from the presence of such air pollutant agent (or combination of agents) in the air in varying quantities.

§ (3)(c)(2), 77 Stat. at 395; *cf.* 42 U.S.C. 7408(a)(2).

[5]*See* § 3(c)(3), 77 Stat. at 395.

[6]*Id.*

[7]The criteria were to reflect "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities." Air Quality Act of 1967, Pub. L. No. 90-148, sec. 107(b)(2), § 2, 81 Stat. 485, 491.

[8]§ 107(b)(1), 81 Stat. at 491.

depend (criteria).

It was not until the Clean Air Amendments of 1970 that Congress provided the federal government with the exclusive authority to set nationally uniform standards for air quality. The states retained the task of implementing the air quality standards, but EPA–created during Congress's deliberations on the 1970 Amendments[9]–was directed to set the standards.[10]

With respect to the air quality *criteria*, Congress required for the first time that the criteria describe effects on "*public* health and welfare." Previously, it had required that criteria describe effects on the health and welfare "of persons"[11] or simply on "health and welfare."[12] Yet, while changing the language, Congress instructed EPA to base the very first NAAQS on HEW's existing criteria.[13] These criteria considered only the consequences for health and welfare of the presence of pollutants in the ambient air and they stressed the difficulties of drawing a bright line between pollution that is harmful and pollution that is not.[14] Congress in 1970 responded to the challenges of scientific uncertainty by further providing that the air quality standards protecting human health–the primary standards–must embody "an adequate margin of safety."[15]

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[9]*See* Reorg. Plan No. 3 of 1970, 5 U.S.C.A. App. (Supp. 1992).

[10]*See* Clean Air Amendments of 1970, Pub. L. No. 91-604, sec. 109, § 4(a), 84 Stat. 1676, 1679-80.

[11]Clean Air Act of 1963, Pub. L. No. 88-206, § 3(c)(2), 77 Stat. 392, 395.

[12]Air Quality Act of 1967, Pub. L. No. 90-148, sec. 107(b)(1), § 2, 81 Stat. 485, 491.

[13]*See* 42 U.S.C. 7409(a)(1)(A), 7409(b)(1).

[14]*See, e.g.*, National Air Pollution Control Administration (NAPCA), HEW, Guidelines for the Development of Air Quality Standards and Implementation Plans 16 (1969).

[15]Sec. 109(b)(1), § 4(a), 84 Stat. at 1679.

During the past thirty years, Congress has enacted numerous revisions to the Clean Air Act, most significantly in 1977 and 1990,[16] and Congress has considered and rejected many more proposed amendments to the Act.[17] The Act today "consumes 313 pages of the Statutes at Large, nearly ten times the length of the original Clean Air Act of 1970. . . "[18] Yet, in the face of all this ongoing legislative activity, Congress has left essentially untouched the fundamental "public health" and "welfare" basis long in existence for the development of air quality criteria and NAAQS. Then, as now, the NAAQS are to be based on "the kind and extent of all identifiable effects on public health and welfare which may be expected from the presence of such pollutant in the ambient air."

In sharp contrast, Congress has made a host of both targeted and sweeping revisions to the Act designed to address the extent to which economic costs and economic and technological feasibility should be relevant in establishing pollution control requirements to implement the NAAQS. For example, Congress added in 1977 and 1990 the detailed nonattainment provisions designed to provide areas not meeting the NAAQS with both more time and more guidance

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[16]Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

[17]For example, Congress held extensive oversight hearings on the Clean Air Act just a few months after the D.C. Circuit in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), upheld EPA's view that costs are irrelevant to the setting of NAAQS. *See Clean Air Act Oversight: Hearings before the Sen. Comm. Envt & Pub. Works*, 97th Cong., 1st Sess., pts 1&2 (1981). Of course, the proper role of costs in setting NAAQS arose in those hearings, *id.* at 85, yet the hearings produced no change in the NAAQS provisions.

[18]Rodgers, *Environmental Law*, *supra*, § 3.2, p. 140.

in achieving that statutory objective.[19]

Congress has also added a series of provisions allowing for specific exemptions and extensions based on economic concerns. For example, both the President of the United States and State Governors are allowed, in specified circumstances, to suspend statutory requirements based on concerns related to unemployment and plant closings. 42 U.S.C. 7410(f)(2), 7410(g)(1)(B). Congress has similarly provided relief from motor vehicle emissions standards, transportation control measures, and emission limitations applicable to certain manufacturing facilities.[20]

In sum, Congress has maintained a sharp distinction at least since passage of the Clean Air Act of 1970, if not long before, between the role of costs in the setting of the air quality standards that serve as the Act's overriding objective and the role of costs in developing the means for implementing those standards. Congress concluded early on that compliance costs should not be relevant to the former and has never disturbed its initial policy judgment. At the same time, Congress concluded that such costs should be relevant to the latter and has since repeatedly revisited precisely how to take such costs into account, in light of its ongoing experience with the Act's actual operation.

B. Particulate Matter and Ozone Rulemakings

In our brief on the merits in *Browner v. American Trucking Associations, Inc.*, No. 99-1257, we described EPA's rulemaking proceedings with respect to the PM and ozone NAAQS. MA & NJ Br. 20-24. That same description is equally relevant to

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[19]*See* 42 U.S.C. 7501-7515.

[20]*See* Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, §§ 4-5, 88 Stat. 246, 256-260; Steel Industry Compliance Extension Act of 1981, Pub. L. No. 97-23, 95 Stat. 139.

the issues in this case.

C. Proceedings Below

In rejecting cross-petitioners' reading of the Clean Air Act, the D.C. Circuit reaffirmed its longstanding conclusion that the plain meaning of the Act forbids EPA from considering costs in setting the NAAQS. U.S. Pet. App. 19a.[21]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Air Act's National Ambient Air Quality Standards (NAAQS) program is one of the signal success stories of American environmental law. Emissions of most of the pollutants regulated by the program have dramatically decreased in the thirty years that the program has been in place, despite substantial increases in the size of our population and in the amount of economic activity.[22] In a recent peer-reviewed, retrospective study of the Clean Air

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[21]The court also held that EPA had erred in declining to consider evidence that ground-level ozone is beneficial for people because it helps to counteract the adverse health effects caused by the decline in the ozone layer (itself caused by air pollution). U.S. Pet. App. 44a-49a. No one has sought review of this ruling.

[22]*See* Richard N.L. Andrews, *Managing the Environment, Managing Ourselves – A History of American Environmental Policy* 280 (Yale Univ. 1999) ("Emissions of particulate matter (smoke) dropped by nearly 80 percent from 1970 to 1994, for instance, and of lead by 98 percent, even as the U.S. population increased by 27 percent, its gross domestic product by 90 percent, and its vehicle use by 111 percent. Emissions of carbon monoxide and volatile organic compounds each dropped by over 20 percent, and sulfur by one-third; only nitrogen oxides increased.") (citing U.S. Council on Environmental Quality, *Environmental Quality: 25th Annual Report–1994-95*, 179, 182 (1997).

Act's first twenty years, the EPA concluded that the Act had produced almost 22 *trillion* dollars more in benefits than it had imposed in costs, and EPA believed that even this dazzling amount probably understated the benefits of the statute.[23] A widely cited survey of EPA managers conducted in the late 1980s concluded that the air pollution addressed by the NAAQS program should be ranked *first* on a list of environmental problems ranked according to the risks they posed to human health, welfare, and ecosystems.[24]

Cross-petitioners want to disrupt this successful regulatory regime. They ask this Court to hold, contrary to thirty years of agency and judicial precedent, that the Clean Air Act requires EPA to balance costs against benefits in setting the NAAQS. But in creating the NAAQS program, Congress was faced with the questions of whether to allow costs to play any role in this program and, if so, what role they should play. Congress ultimately chose to exclude the consideration of costs from the process of *setting* the NAAQS but to allow the consideration of costs in the process of *implementing* these standards.

1. The meaning of the Clean Air Act is plain, and has been settled for decades: costs may not be considered in setting the NAAQS. Sections 108 and 109 of the Act clearly direct EPA, in setting the NAAQS, to consider only the effects on public health and welfare of breathing polluted air. These provisions instruct EPA to base the NAAQS on air quality criteria that themselves discuss only the effects on public health and welfare of "the presence of [an air] pollutant in the ambient air." 42 U.S.C. 7408(a)(2). This instruction leaves no room for the consideration of costs. Were there any doubt on this point,

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[23]EPA, Office of Air and Radiation, *The Benefits and Costs of the Clean Air Act, 1970 to 1990* at ES-8 (Oct. 1997). This report focused almost exclusively on the consequences of regulating the criteria air pollutants. *Id.*

[24]U.S. EPA, *Unfinished Business: A Comparative Assessment of Environmental Priorities* 58 (1987).

however, it would be dispelled by the numerous provisions of the Act explicitly allowing or requiring the Administrator to consider costs in implementing the NAAQS; clearly Congress knew how to permit the agency to consider costs when Congress wanted to. For cross-petitioners to ask this Court to insert the word "costs" into sections 108 and 109 in the face of Congress's clear decision to exclude it is to request a large and unwholesome shift in the Court's approach to interpreting statutes.

Given the clarity of the statutory text, this Court should not distort the plain meaning of the Clean Air Act in order to avoid the constitutional issue of delegation. The error in rewriting a statute simply to avoid a constitutional issue is particularly pronounced where, as here, the resolution of the constitutional issue is, under this Court's precedents, straightforward and where, if anything, the proffered alternative interpretation(s) of the statute would not avoid the constitutional issue as cross-petitioners see it.

Cross-petitioners' inability to mount any convincing argument based on the language or history of the Clean Air Act forces them to ask this Court to adopt a special canon of construction tailor-made by them for this case: they ask the Court to hold that unless Congress *explicitly* prohibits the consideration of costs in a statute, costs must be considered. This is nothing other than an inappropriate plea to have this Court rewrite the Clean Air Act in order to further cross-petitioners' views on social policy.

2. The Clean Air Act is perfectly rational as written and as understood for three decades. Contrary to the excited claims of those challenging EPA's PM and ozone rules, the Act does not force this country to abandon industrial activity; it does not allow the Administrator privately to consider costs and publicly to deny it; and it reflects Congress's considered judgment concerning potential tradeoffs between regulatory costs and health. Finally, by precluding the consideration of costs in setting the NAAQS but by allowing such

consideration in implementing them, the Clean Air Act avoids one of the most troublesome features of the cost-benefit balancing cross-petitioners endorse: its tendency to underestimate the benefits of regulation and to overestimate the costs. This tendency also helps to explain what would otherwise be one of the great unsolved mysteries of the regulatory state: how a set of standards set without regard to cost can, even from the perspective of cost-benefit analysis, become one of the great success stories of environmental law.

ARGUMENT

I. THE PLAIN MEANING OF THE CLEAN AIR ACT PRECLUDES EPA FROM CONSIDERING COSTS IN SETTING THE NAAQS

Cross-petitioners and their supporting respondents and amici offer a dizzying array of possible interpretations of the Clean Air Act.[25] The proffered interpretations do, however, have one thing in common: all of them would import some kind of balancing of costs and benefits into the process of setting the NAAQS.

The plain language of the Clean Air Act admits of only one conclusion: the Act precludes EPA from considering costs in

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[25]Cross-petitioners and respondents and amici in support of cross-petitioners appear to disagree both over whether EPA is *required or merely permitted* to consider non-health factors in setting the NAAQS (*compare* ATA Br. 32 *with, e.g.*, American Boiler Mfrs. Am Br. 4) and over *which* non-health factors are to be considered (*compare* ATA Br. 30 (cost-benefit balancing might mean analyzing standard according to "significant risks or other similar rubrics," or according to the quality-adjusted life-years saved by the standard) *with* Hatch Am. Br. 18 ("feasibility concerns would not trump health" under the statute) *and with* Inhofe Am. Br. 10-12 (EPA permitted to consider countervailing health risks, risk significance, cost and technological feasibility)).

setting the NAAQS. "[I]n any case of statutory construction, our analysis begins with the language of the statute . . . . And where the statutory language provides a clear answer, it ends there as well." *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 120 S.Ct. 2180, 2191 (2000), quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal citation and quotation marks omitted). As we explain below, the statutory text alone is clear enough to resolve the issue presented here; that text precludes the cost-benefit balancing cross-petitioners embrace.[26] Where Congress has wanted to include some kind of balancing test in health, safety, and environmental legislation, it has done so clearly, carefully, and with due attention to the specific circumstances at hand. In the Clean Air Act itself, Congress clearly and carefully balanced, or allowed EPA to balance, costs and benefits only when the NAAQS are being implemented, not when they are being set. Cross-petitioners' efforts to force the meaning they desire into the language of the statute must fail.

A. Sections 108 and 109 of the Clean Air Act Clearly Direct EPA to Consider Only the Effects of Air Pollution on Public Health and Welfare in Setting the NAAQS

Section 109(b)(1) of the Clean Air Act provides that the primary NAAQS are standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b)(1). Secondary NAAQS are those "requisite to protect

[26]Lest there remain any doubt, however, we also offer citations to the legislative history confirming the conclusion that the Clean Air Act precludes the consideration of costs in setting the NAAQS. For a fuller account of the evolution of the NAAQS program in Congress, see MA & NJ Br., No. 99-1257, at 7-19; Clean Air Trust Am. Br., *passim*.

the public welfare"; they do not similarly allow for a margin of safety. 42 U.S.C. 7409(b)(2). In determining what it means to "protect the public health" with an "adequate margin of safety" and what it means to "protect the public welfare," it is crucial to consider the kind of evidence Congress directed EPA to take into account in setting the NAAQS.

Congress directed EPA to set the NAAQS "based on" the air quality criteria. 42 U.S.C. 7409(b)(1)-(2). In formulating the directive in this way in the 1970 amendments, Congress eliminated previous language that had required the states, in setting their own air quality standards, to set standards "consistent with" *both* "the air quality criteria *and* recommended control techniques" HEW had previously been required to issue.[27] Clearly, then, in 1970 Congress was instructing EPA to base the NAAQS on air quality criteria alone. The content of the criteria documents is thus critical to determining the content of the NAAQS.

In section 108(a)(2), Congress supplied the answer to the question concerning the proper scope of the criteria documents in unambiguous terms. This section provides that the air quality criteria are to "reflect the latest *scientific knowledge* useful in indicating the kind and extent of all *identifiable* effects on *public health or welfare* which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." 42 U.S.C. 7408(a)(2). Thus: air quality criteria are not to be based on *economic* information; the effects of concern are not *costs*; the effects to be discussed are not *theoretical* effects predicted by abstract economic models; and the relevant effects are not those arising from *regulation itself*.

This conclusion is further confirmed by section 108(b)(1). This provision requires EPA, "[s]imultaneously with *the issuance of criteria* under subsection (a) of this section," to issue information on the costs and feasibility of various pollution

[27]Air Quality Act of 1967, Pub. L. No. 90-148, sec. 108(c)(1), § 2, 81 Stat. 485, 492 (emphasis added).

control technologies. 42 U.S.C. 7408(b)(1) (emphasis added). Section 108(b)(1) thus clearly distinguishes the "criteria"-on which NAAQS are to be "based," 42 U.S.C. 7409(b)(2)-from information on economic costs and technological feasibility.

Section 109(a)(1) and 109(b)(1) together also make plain that air quality criteria must discuss only the effects of air pollution on health and welfare, not the effects of regulation on the economic costs of pollution control. In section 109(a)(1), Congress directed the Administrator to issue, within thirty days of December 31, 1970, primary and secondary NAAQS "for each air pollutant for which air quality criteria have been issued prior to such date," 42 U.S.C. 7409(a)(1), and in section 109(b), Congress provided that the new primary and secondary NAAQS were to be "based on such criteria."[28] 42 U.S.C. 7409(b)(1)-(2). The criteria that had been issued prior to the stated date were those issued by the Secretary of HEW under the prior version of the Clean Air Act. In directing EPA to set the new NAAQS based on HEW's criteria documents, Congress explicitly endorsed the documents HEW had so far compiled.

The HEW criteria documents that Congress endorsed confirm the exclusive relevance of scientific evidence of human health effects and the irrelevance of economic effects. HEW opened its 1969 criteria document on particulate matter with the following description of air quality criteria:

> Air quality criteria are an expression of the scientific knowledge of the relationship between various concentrations of air pollutants in the air and their adverse effects on man and his environment. . . . Air quality criteria are descriptive; that is, they describe the effects that have been observed to occur when the ambient air level of a

[28]For air pollutants for which criteria were issued after December 31, 1970, EPA was directed to issue NAAQS simultaneously with those criteria and, again, the NAAQS for such pollutants were to be "based on such criteria." 42 U.S.C. 7409(a)(1), 7409(b)(1).

> pollutant has reached or exceeded specific figures for a specific time period.[29]

In keeping with this understanding of the role of air quality criteria, HEW's criteria discussed scientific research from epidemiological, clinical, toxicological, and meteorological investigations.[30] They discussed effects on human health, including the initiation and aggravation of respiratory diseases including asthma,[31] impairment of the oxygen-carrying capacity of the blood,[32] and premature death,[33] and they discussed these effects only insofar as they were tied to air pollution.[34] HEW's criteria documents did not discuss compliance costs, and they did not discuss effects that arose

[29]*See* NAPCA, HEW, Pub. No. AP-49, Air Quality Criteria for PM 1-1 (1969) (1969 PM Criteria Doc.); NAPCA, HEW, Pub. No. AP-62, Air Quality Criteria for Carbon Monoxide 1-1 (1970) (1970 CO Criteria Doc.); NAPCA, HEW, Pub. No. AP-64, Air Quality Criteria for Hydrocarbons 1-1 (1970) (1970 HC Criteria Doc.); NAPCA, HEW, Pub. No. AP-63, Air Quality Criteria for Photochemical Oxidants 1-1 (1970) (1970 Ozone Criteria Doc.); NAPCA, HEW, Pub. No. AP-50, Air Quality Criteria for Sulfur Oxides 1-1 (1969) (1969 SOx Criteria Doc.); *see also* Pub. Health Service, HEW, Pub. No. 1619, Air Quality Criteria for Sulfur Oxides iv (1967) (1967 SOx Criteria Doc.).

[30]*See, e.g.*, 1967 Sox Criteria Doc., *supra*.

[31]*See* 1970 Ozone Criteria Doc., *supra*, at 10-7.

[32]*See* 1970 CO Criteria Doc., *supra*, at 10-3.

[33]*See* 1967 SOx Criteria Doc., *supra*, at xxix.

[34]*See* 1967 SOx Criteria Doc., *supra*, at liii (graphical depiction of results of studies concerning health and welfare effects of sulfur oxides); 1969 PM Criteria Doc., *supra*, at 188-89 (summary of health effects at various exposure levels); 1970 CO Criteria Doc., *supra*, at 10-7 (table reflecting health effects at various exposure levels); 1970 Ozone Criteria Doc., *supra*, at 10-9 to 10-13 (text and table detailing health and welfare effects associated with different levels of exposure).

from regulation itself rather than from air pollution. Congress's endorsement of HEW's basic approach in the criteria documents compiled as of 1970 thus shows what the criteria on which the NAAQS are to be based should include (scientific research into the health effects of pollution) and what they should not include (economic research into the economic consequences of regulation).[35]

The explicit directive to EPA to base the first NAAQS on HEW's criteria documents also helps to explain the meaning of the "adequate margin of safety" that Congress required for the NAAQS. 42 U.S.C. 7409(b)(1). The concept of a margin of safety as embraced in the Clean Air Act was an outgrowth of HEW's experience in developing the first criteria documents. HEW's review of the scientific literature on the criteria pollutants had revealed a diverse array of harms which occurred at a diverse array of pollution levels.[36] HEW also was convinced that the lowest level at which an air pollutant was shown in scientific research to have caused an adverse public health effect was not necessarily the lowest level at which that pollutant in fact caused such an effect.[37] HEW thus

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[35]Because of the importance of the issues settled therein, copies of all the relevant HEW criteria documents that predate passage of the 1970 Act have been lodged with the Court.

[36]*See* sources cited *supra*, n. 34.

[37]In its 1969 guidelines on developing air quality criteria, HEW explained:

> The exposure levels which have thus far been associated with identifiable effects . . . are not necessarily the lowest levels of exposure that will produce such effects. Nor are those effects necessarily the only ones produced by such exposures. Knowledge of the synergistic effects of air pollutants is limited. So is knowledge of possible long-term genetic effects. . . . In short, air quality criteria cannot be interpreted as threshold values; indeed, for many types of air pollutants, there may not be a threshold of risk to health and the environment. In the evaluation of biological effects of environmental contaminants, whether in the community or occupational environment, accumulating evidence has almost invariably shown that adverse effects can and do occur at exposure levels that at one time were considered "safe."

NAPCA, HEW, Guidelines for the Development of Air Quality Standards and Implementation Plans, *supra*, at 16.

recommended that margins of safety be incorporated in then-existing state air quality standards in order to remedy the problem of under-protection that might otherwise follow from the limits of scientific proof.[38] Congress accepted this recommendation when it required in 1970 that the federal government set ambient air quality standards that allowed "an adequate margin of safety."[39] The requirement that EPA allow an adequate margin of safety in the NAAQS thus signals a congressional embrace of a particular approach towards the scientific uncertainty that inevitably attends estimates of the effects of air pollution, an approach that leans in the direction of stricter rather than more lenient standards where (as they always are) the facts are uncertain.

Congress's embrace of HEW's original criteria also helps to explain the meaning of the "public health" to be discussed in the criteria and protected by the NAAQS. Although Congress in the 1970 Clean Air Amendments shifted from requiring that criteria describe effects on "health and welfare"[40] to requiring

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[38]1969 PM Criteria Doc., *supra*, at 189; *see also* 1970 Ozone Criteria Doc., *supra*, at 10-13; 1970 CO Criteria Doc., *supra*, at 10-6.

[39]The Senate report on the legislation explained that "margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified." S. Rep. No. 91-1196, 91st Cong., 2d Sess., at 10 (1970).

[40]Air Quality Act of 1967, Pub. L. No. 90-148, sec. 107(b)(1), § 2, 81 Stat. 485, 491.

that they describe effects on "*public* health and welfare," Congress's simultaneous endorsement of the criteria documents already compiled demonstrates Congress's belief that those documents adequately reflected the kinds of human health effects Congress thought relevant to setting the NAAQS. In other words, the insertion of the word "public" before the word "health" did not fundamentally change the nature of the inquiry to be conducted in developing the criteria documents; specifically, it did not change that inquiry from a scientific investigation of the health and welfare effects of pollution into an investigation of the economic costs of regulation. Instead, by targeting public health, Congress simply instructed EPA to target health effects in *populations* rather than in single individuals.

The language of the Clean Air Act also clearly instructs EPA to consider only the effects on human health and welfare that are caused by air pollution, not those that might be caused by regulation itself. In describing the criteria on which the NAAQS are to be based, section 108(a)(2) makes this point plain by instructing EPA to consider only the effects on health and welfare "which may be expected from the presence of [an air] pollutant in the ambient air, in varying quantities." 42 U.S.C. 7408(a)(2). This is a clear directive to EPA to focus on the effects of air pollution, not the effects of regulation.

Elsewhere in the Act, Congress demonstrated that it knew how to tell EPA to look at health and welfare effects arising from causes other than air pollution. Indeed, in the Clean Air Act, Congress invented a new (albeit clunky) phrase–"nonair quality impacts"–to refer to such effects. *See, e.g.*, 42 U.S.C. 7411(a)(1) (defining "standard of performance" for new stationary sources to include consideration of, among other things, "any nonair quality health and environmental impact"); 42 U.S.C. 7509(d)(2) (requiring states that have not attained NAAQS by applicable deadlines to revise SIPs to include measures prescribed by Administrator, including measures feasible "in light of technological achievability, costs,

and any nonair quality and other air quality-related health and environmental impacts"); 42 U.S.C. 7545(k)(1) (directing Administrator, in establishing requirements for reformulated gasoline, to take into account "the cost of achieving such emission reductions, any nonair-quality and other air-quality related health and environmental impacts and energy requirements"). No such reference to "nonair quality" impacts appears anywhere in the statutory provisions relevant to the setting of the NAAQS. Here too, moreover, Congress's endorsement of HEW's original criteria documents is revealing: HEW did not discuss the effects of *regulation* on human health and welfare, it discussed the effects of *air pollution* on human health and welfare.

Consistent with the lessons learned from HEW's experience in developing the original criteria documents, Congress expressly acknowledged the necessity of deference to the Administrator's "judgment" in promulgating any NAAQS based on such criteria. 42 U.S.C. 7409(b)(1-2). HEW's criteria documents testified to the high degree of scientific uncertainty unavoidably surrounding both the assessment of public health effects at varying levels of air pollution and the related task of selecting a level requisite to protect public health. Congress provided procedural and substantive guidance for those administrative actions, yet recognized the Administrator's decisions would ultimately require "judgment."

In directing EPA to set standards to protect the public health and welfare, Congress nowhere added a qualifier based on economics or feasibility. Cross-petitioners no doubt wish that the statute were written differently; they no doubt wish that the statute provided, for example, that NAAQS are standards requisite to protect the public health "in light of economic costs, technological feasibility, or any other factor." But the statute is not so written and the words that Congress in fact used leave no room for cross-petitioners' preferred policy outcome. The Court should, accordingly, decline cross-petitioners' invitation to add to the factors Congress itself has

identified as relevant to the process of setting the NAAQS. *See, e.g., Union Electric Co. v. EPA*, 427 U.S. 246, 257 (1976) (refusing to require Administrator, in reviewing adequacy of SIPs, to consider factors (cost and feasibility) not specified by section 110(a)(2) of Clean Air Act, 42 U.S.C. 7410(a)(2)). This is especially so where, as here, Congress clearly paid close attention to the issue of economic costs and specified that this factor would play an important role, not in the setting of the NAAQS, but in their implementation.

B. Congress's Explicit Recognition of the Relevance of Costs to the Implementation of the NAAQS Confirms the Irrelevance of Costs to Setting the NAAQS

The NAAQS themselves do not regulate any source of pollution. Instead, they set the health-based benchmark that the regulation of sources of pollution is to achieve. Pollution sources are regulated under the Act both by the states and by the federal government. In both state and federal regulation of pollution sources, costs and feasibility play a significant role. Moreover, in cases in which efforts to achieve the NAAQS cause significant economic hardship, Congress has provided several specific, targeted escape valves allowing departures from the requirements of the Act.

These features of the Act, discussed in detail below, lead to two important conclusions. First, because so many provisions of the Clean Air Act explicitly require or allow EPA to take costs into account in setting standards under the Act, Congress's failure to explicitly allow EPA to consider costs in setting the NAAQS should be taken as decisive evidence that it meant to preclude such consideration in that process. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *GMC v. United States*, 496 U.S. 530, 537-38 (1990) (unanimously

declining to insert deadline into section 110(a)(3)(A) of Clean Air Act, noting Congress's establishment of explicit deadlines elsewhere in Act), quoting *Russello v. United States*, 464 U.S. 16, 23 (1983), quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). Second, to import the consideration of costs into the process of setting the NAAQS would upset Congress's carefully constructed, and carefully limited, scheme for allowing such economic costs to affect the quality of the ambient air.

The states are the entities primarily responsible for implementing the NAAQS. The states' basic obligation under the Act is to ensure attainment and maintenance of the NAAQS by the relevant deadline; "[s]o long as the national standards are met, the State may select whatever mix of control devices it desires . . ." *Union Electric Company*, 427 U.S. at 266; *see also Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975). The states' deadlines, however, may be extended by the Administrator based in part on the "availability and feasibility of pollution control measures." 42 U.S.C. 7502(a)(2)(A). In numerous ways, moreover, states themselves are encouraged to choose the most cost-effective or least economically disruptive means of achieving the NAAQS. 42 U.S.C. 7410(a)(2)(A) (including "economic incentives such as fees, marketable permits, and auctions of emissions rights" in the list of control measures states may include in their SIPs); 7410(a)(2)(H) (requiring states to provide for revision of their SIPs "as may be necessary to take account of . . . the availability of improved or more expeditious methods of attaining" the NAAQS); 42 U.S.C. 7410(a)(3)(B) (in aftermath of energy crisis of early 1970s, requiring states to determine whether they could revise their SIPs in relation to fuel burning stationary sources without interfering with NAAQS compliance).

In limited circumstances, states may temporarily avoid some of their obligations under the statute in order to prevent significant economic disruption and unemployment. For

example, a Governor may petition the President "to determine that a national or regional energy emergency exists of such severity" that sanctions for excess emissions of sulfur dioxide or nitrogen oxides should be temporarily suspended. 42 U.S.C. 7410(f). Such a suspension may be issued only upon a finding of "high levels of unemployment or loss of necessary energy supplies for residential dwellings" within the vicinity of an affected source. 42 U.S.C. 7410(f)(2). In addition, if a state has submitted a revision to a SIP which has been pending before the Administrator for a year or more, the Governor of that state may temporarily suspend the provisions of the SIP she seeks to revise, *if* the revised SIP meets the requirements of the Act and "is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing." 42 U.S.C. 7410(g)(1). In a similar vein, a Governor may, in cooperation with the President, require the use of locally or regionally available coal or coal derivatives in order to avoid "significant local or regional economic disruption or unemployment." 42 U.S.C. 7425(a)-(b).

The federal government also plays a substantial role in efforts to achieve the NAAQS. EPA sets emissions standards for cars and trucks, major new stationary sources of pollution, and other pollution sources. Although these requirements need not pertain exclusively to the pollutants regulated under the NAAQS program, in practice, those pollutants have been their focus. Congress has allowed or required EPA to consider costs in every one of these standard-setting contexts. *See* 42 U.S.C. 7521(a)(3)(A)(i) (in setting standards for mobile sources, Administrator is directed to give "appropriate consideration" to "cost, energy, and safety factors"); 42 U.S.C. 7545(c)(2)(B) (Administrator may not regulate fuel additive on account of its harm to vehicle emission control systems unless it first does "cost benefit analysis" of such regulation); 42 U.S.C. 7411(a)(1), (b)(1) (for certain categories of new sources, Administrator must set "standards of performance" which take into account

"costs and nonair quality health and environmental impacts and energy requirements"); 42 U.S.C. 7547(a)(3) (in setting deadlines for compliance with emissions standards for nonroad vehicles, Administrator is directed to give "appropriate consideration" to cost); 42 U.S.C. 7571(b) (in setting deadlines for compliance with emissions standards for aircraft, Administrator is directed to give "appropriate consideration" to cost).

Thus both the states and EPA enjoy extensive authority to consider costs in their efforts to achieve air quality meeting the NAAQS. To be sure, neither the states nor EPA has the authority to revise the NAAQS themselves based on costs, or to extend the deadlines for meeting the NAAQS beyond the deadlines and extensions provided in the statute. Only Congress has this authority. A brief review of the history of the NAAQS program in Congress shows that Congress has not hesitated to soften the requirements of the Clean Air Act where it has found this necessary to avoid significant economic disruption. Tellingly, however, Congress has never chosen to avoid such disruption by tinkering with the NAAQS themselves. Hence, in Congress as well as in the states and at EPA, costs find their expression in the implementation rather than in the setting of the NAAQS.

On numerous occasions, Congress has revised the deadlines and implementation strategies required by the Act. *See, e.g.*, Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 5(a)-(b), 88 Stat. 246, 258 (extending deadlines for motor vehicle emissions standards); *id.* § 4, 88 Stat. at 256-58 (restricting EPA's authority to impose transportation control measures in federal implementation plans and requiring a study of the economic impact of certain transportation control measures); Steel Industry Compliance Extension Act of 1981, Pub. L. No. 97-23, 95 Stat. 139 (allowing, for certain iron- and steel-producing operations, extension of deadline for compliance with emission limitations).

In addition, the extraordinarily detailed nonattainment

provisions Congress added to the Act in 1977 and 1990 reflect just such a consideration of economic costs and feasibility. Congress declined to require immediate strict adherence to deadlines for NAAQS compliance that had since passed. In 1977, for example, Congress instead developed a program that allowed for states to develop nonattainment plans that achieved "reasonable further progress" toward attaining NAAQS. See 42 U.S.C. 7501-7509a. And in 1990, Congress substantially extended (by as much as twenty years) the deadlines for areas that had not yet attained the NAAQS in effect at that time. *See, e.g.*, 42 U.S.C. 7511(a)(1).

In adjusting the deadlines and implementation strategies for meeting the NAAQS, Congress *itself* has balanced the public health and welfare goals of the statute against the economic and technological challenges posed by meeting those goals. *Cf. American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981). Congress has concluded that to the extent any such balancing is relevant, its goals are best met by confining the consideration of costs and feasibility to implementation of the NAAQS rather than by basing the setting of the NAAQS on such factors in the first instance.

C. The Textual Arguments of Cross-Petitioners and Their Supporting Respondents and Amici Are Without Merit

Cross-petitioners and their supporting respondents and amici attempt to smuggle the consideration of costs into the process of setting the NAAQS through several arguments based on the language of the Act. These arguments are exceedingly weak. Indeed, insofar as cross-petitioners and their supporters simply ignore statutory language contrary to their central claim, their arguments border on the wholly frivolous.

"Public Health." Cross-petitioners and their supporting respondents and amici argue that the term "public health" imports consideration of compliance costs into the NAAQS-

setting process. This argument is wrong for many reasons.

First, as already discussed, in the 1970 amendments to the Clean Air Act, Congress expressly embraced HEW's approach to describing impacts on public health by requiring that EPA's new NAAQS be based on the criteria documents HEW had already compiled. 42 U.S.C. 7409(a)(1)(A), 7409(b)(1). HEW's approach did not look at the economics of regulation. Instead, it looked at the health effects of air pollution on the human population. Cross-petitioners' interpretation of the words "public health" is inconsistent with Congress's endorsement of HEW's criteria documents.

Moreover, cross-petitioners' interpretation would create an awkward situation in which costs would be relevant to setting the primary NAAQS, but not to setting the secondary NAAQS. Only the primary NAAQS are set according to the requirements of "public health," which, cross-petitioners argue, are determined by looking at costs. 42 U.S.C. 7409(b)(1). Thus, under cross-petitioners' interpretation of the term "public health," EPA is obliged to be cost-conscious in protecting human health, but is not so obliged when protecting the environment through the secondary NAAQS. This interpretation is in considerable tension with Congress's predominant focus on the health effects of air pollution.[41]

Furthermore, cross-petitioners' argument is inconsistent with the text of numerous provisions of the Act. Many provisions of the Act explicitly allow or require EPA to consider *both* economic costs *and* "public health" in setting regulatory standards under the Act. *See, e.g.*, 42 U.S.C. 7502(a)(1), 7502(a)(3)(A)(i) (motor vehicles); 42 U.S.C. 7411(a)(1), 7411(b)(1) (new source performance standards); 42 U.S.C. 7547(a)(1), 7547(a)(3) (nonroad vehicles); 42 U.S.C. 7571(a)(2)(A), 7571(b) (aircraft emissions). *See also* 42 U.S.C.

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[41]Cross-petitioners also argue that the term "welfare" incorporates consideration of costs, but this argument simply ignores critical language in the definition of welfare. See *infra* at 31.

7612(a) (requiring economic impact analysis describing effects of Clean Air Act standards on the "public health" *and* "economy"). If "public health" includes "costs," as cross-petitioners argue, Congress could have rested, in every one of the cited sections, with a simple directive to EPA to consider effects on public health. To paraphrase this Court's decision last Term in *Public Lands Council v. Babbitt*, 120 S.Ct. 1815, 1826 (2000), why would Congress add the words "costs" if (as cross-petitioners' argument implies) they add nothing?[42]

"Welfare." Next, cross-petitioners argue that EPA must consider costs in setting the NAAQS because section 108(a)(2)(C) directs EPA to describe, in its criteria documents, "any known or anticipated adverse effects on welfare." 42 U.S.C. 7408(a)(2)(C). Because, they reason, the definition of "welfare" includes "effects on economic values," the criteria documents must describe the compliance costs of regulation. ATA Br. 37-39.

Even if cross-petitioners' interpretation of the word "welfare" were correct (which, as we explain below, it is not), their argument would be irrelevant to EPA's decision to revise the *primary* NAAQS for PM and ozone. Cross-petitioners' erroneous reading of the definition of "welfare" in section 302(h) cannot change the language of section 109(b)(1), which requires primary NAAQS to protect the *public health*. 42 U.S.C. 7409(b)(1). The criteria documents' discussion of effects on welfare is not relevant to setting the primary NAAQS; surely cross-petitioners are not arguing that effects on wildlife, for example, should be considered in setting the primary NAAQS, and yet effects on wildlife are also included in the definition of "welfare." Cross-petitioners' arguments based on the

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[42]*See also Atlantic Mutual Ins. Co. v. Commissioner of Internal Revenue*, 523 U.S. 382, 388 (1998) (declining to accept interpretation of statute that led to redundancy); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("a statute must, if possible, be construed in such fashion that every word has some operative effect").

definition of welfare are irrelevant to the primary NAAQS.

In setting the secondary NAAQS for an air pollutant, EPA is explicitly instructed to consider only the effects on welfare *"associated with the presence of such air pollutant in the ambient air."* 42 U.S.C. 7409(b)(2) (emphasis added). Thus, even where secondary NAAQS are concerned, the Clean Air Act makes clear that the only welfare effects that are relevant are those arising from *air pollution*, not those arising from *regulation*.

In any event, cross-petitioners' argument that "welfare" encompasses general economic effects is mistaken. Cross-petitioners can offer this argument only by ignoring critical language in section 302(h)'s definition of "welfare." Section 302(h) provides in full:

> All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, *whether caused by transformation, conversion, or combination with other air pollutants*.

42 U.S.C. 7602(h) (emphasis added).[43] The last, italicized clause of this definition makes clear that the effects on "welfare" with which Congress was concerned were only the effects *from air pollution*. Cross-petitioners can argue that "welfare" includes the compliance costs of regulation itself only by ignoring the critical last clause of this definition; indeed, they omit this portion of the definition from their brief entirely without any notation, such as an ellipsis, indicating

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[43]The italicized clause was added in 1990, § 109(b), 104 Stat. 2470, to "make[] clear that welfare effects extend to *consequences of air pollutant emissions* that may occur after the pollutant has been chemically altered following its release, and to effects caused by the combined impacts of air pollutants." H.R. Rep. No. 101-490, 101st Cong. 2d Sess. 274 (1990) (emphasis added).

that they have done so. ATA Br. 37-38; *see also* GE Am. Br. 16.[44]

"Appropriate." Respondents in support of cross-petitioners argue that cost-benefit analysis is imported into the NAAQS-setting process via the word "appropriate" in section 109(d)(1). App. Pwr. Br. 39-40. Again, however, reading the entire statutory provision at issue serves to defeat respondents' argument. Section 109(d)(1) provides in pertinent part:

> Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards *as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section.*

42 U.S.C. 7409(d)(1) (emphasis added). Thus "appropriateness" is defined by the requirements of sections 108 and 109(b), which, we have established, do not require or allow cost-benefit balancing.

Furthermore, the word "appropriate" appears only in reference to the revision of an existing NAAQS or the post-1980 establishment of a new NAAQS, not in reference to the setting of the first NAAQS in the 1970s. According to respondents' view that the word "appropriate" has a separate office from the Act's other language, then, the initial NAAQS set in the 1970s must have been governed by a different standard than revisions to the NAAQS. Section 109(b)(1) explicitly rules out such a possibility; it provides that primary

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[44]Cross-petitioners' interpretation of the words "welfare" and "public health" also would render unnecessary section 108(b)(1)'s directive to EPA to furnish information on pollution control costs. 42 U.S.C. 7408(b)(1). If information on costs were a requisite part of the criteria documents, as cross-petitioners argue, then there would have been no need for a separate requirement that EPA develop information on the costs of pollution control.

NAAQS "may be revised in the same manner as promulgated." 42 U.S.C. 7409(b)(1).

"Adequate margin of safety." Respondents supporting cross-petitioners argue that Congress must have meant, in requiring a margin of safety, to require EPA to consider costs. App. Pwr. Br. 36. However, as explained above, *supra* at 20-21, Congress required a margin of safety in 1970 in response to HEW's conviction that the lowest levels at which scientific research had shown adverse effects were probably not the lowest levels at which such effects occurred. In its early criteria documents–on which Congress required EPA to base the first NAAQS (42 U.S.C. 7409(a)(1), 7408(b))–HEW had thus recommended a "margin of safety" designed to protect subpopulations more vulnerable to the effects of air pollution than the general population.[45] The requirement of a margin of safety was thus a response to scientific uncertainty, not a way to sneak economic consequences into the setting of the NAAQS.[46]

"Judgment." Several amici argue that the word "judgment" in section 109(b)(1) requires EPA to consider costs. GE Am. Br. 13; Hatch Am. Br. 9-10. As we set forth above, however, *supra* at 23, this term signals only Congress's candid recognition of the uncertainties attending decisions about the quality of air requisite to protect the public health. The term cannot fairly be read, notwithstanding amici's claim, to allow the Administrator to consider any factor that she might in her own "judgment" deem relevant. Indeed, that is precisely the

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[45]*See, e.g.*, 1970 Ozone Criteria Doc., *supra*, at 10-13.

[46]The concept of a margin of safety has a long history in toxicology. Toxicologists have long recommended that acceptable daily intakes of toxic substances be determined by dividing by 100 the level at which no adverse human health effects have been found to occur, in order to account for variations in the sensitivity of the human population. *See* National Research Council, *Science and Judgment in Risk Assessment* 29-31 (1994).

kind of fanciful statutory interpretation that, unlike the reading we support, could theoretically raise a nondelegation issue.

Public comments. Remarkably, cross-petitioners also argue that the fact that EPA must respond to the public's "written comments, data, or documentary information," 42 U.S.C. 7607(d)(3), means that these comments, data, and information will be "part of the Administrator's decisionmaking data set." ATA Br. 40. That is to say, apparently, the Administrator must consider anything submitted in the public record as relevant to her decision setting the NAAQS. Such a process would allow public commenters to determine the scope and content of EPA's obligations in setting the NAAQS. The proposition is fantastical.

Information to States on Control Technologies. Cross-petitioners also assert that costs must be considered in setting the NAAQS because Congress directed EPA to provide information on the costs and feasibility of control technologies in issuing new air quality criteria pursuant to section 108(a). ATA Br. 40. This argument, too, is misguided for several reasons.

As explained above, *supra* at 17, when Congress amended the Clean Air Act in 1970, it eliminated language that had previously required air quality standards to be consistent with both air quality criteria *and* the information on control techniques HEW had been required to provide.[47] Moreover, the Act itself distinguishes the "criteria" on which NAAQS are to be based from the information on control techniques required by section 108(b)(1). 42 U.S.C. 7408(b)(1). Cross-petitioners would undo these careful legislative determinations by contending that the information on control

[47]Air Quality Act of 1967, Pub. L. No. 90-148, sec. 108(c)(1), 81 Stat. 485, 492.

techniques must influence the setting of the NAAQS.[48]

The information on control techniques required by section 108(b)(1) was clearly designed not to affect the NAAQS-setting process, but instead to give the states a running start on developing plans to implement the NAAQS. In requiring that this information be provided to "states and appropriate air pollution control agencies," Congress clearly contemplated that this information would be used by such entities in implementing the NAAQS in timely fashion. 42 U.S.C. 7408(b)(1).[49] Indeed, the state respondents supporting cross-

[48]Cross-petitioners' claim that this Court should import cost considerations into section 109(b) because the statute does not say that the NAAQS should be based "solely" on the criteria (ATA Br. 39) likewise ignores the full language of the statute clearly distinguishing criteria from information on costs, 42 U.S.C. 7408(b)(1); ignores Congress's deliberate decision in 1970 to uncouple the choice of standards from information on costs and feasibility, *see* Air Quality Act of 1967, Pub. L. No. 90-148, sec. 108(c)(1), § 2, 81 Stat. 485, 492; and ignores Congress's ability, demonstrated elsewhere in the Act, to direct EPA to consider costs when it wanted the agency to do so. Congress need not have added the extra word "solely" to add an extra dollop of clarity to an already plain statutory scheme. Cross-petitioners' contrary suggestion is merely a variant of their misguided request for a new canon of statutory construction, discussed *infra* at 39-41.

[49]The Senate Report on the 1970 Amendments explained: "Reports on control techniques, as under existing law, would be issued simultaneously with the publication of criteria. The Committee recognizes that the States will continue to need this information to develop meaningful programs for implementation of ambient air quality standards on a regional basis." S. Rep. No. 91-1196, 91st Cong., 2d Sess., at 9 (1970). Cross-petitioners can see no purpose in EPA's development of information on control costs and technologies, other than to inform the NAAQS-setting process, because they are apparently unable to believe that Congress would want to give the states plenty of time to contemplate their possible regulatory

petitioners recognized this point in the court below. They argued that EPA had erred in failing to provide the information required by section 108(b) with respect to the rules at issue here, complaining that EPA had "side-stepped its responsibility under §108 to assist the States by developing fundamental information, thus making it much more difficult for the States to develop and implement adequate control strategies." State Petitioners' Final Merit Br., at 9, *American Trucking Assns. v. Browner*, No. 97-1440 (D.C. Cir. 1999).

CASAC advice. Cross-petitioners also maintain that section 109(d)(2)(C)(iv) imports cost considerations into the NAAQS-setting process. ATA Br. 41. This is plainly wrong. Section 109(d)(2)(C)(iv) requires CASAC to

> advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result *from various strategies for* attainment and maintenance of such national ambient air quality standards.

42 U.S.C. 7409(d)(2)(C)(iv) (emphasis added). Cross-petitioners, once again, simply ignore critical language in the statutory text as well as the basic distinction Congress drew between the *setting* and the *implementing* of NAAQS, in which Congress allowed for consideration of costs only with regard to the latter. Section 109(d)(2)(c)(iv) explicitly requires CASAC to report only on the broad implications of *"strategies for"* attainment and maintenance of the NAAQS, not on the implications of the NAAQS themselves. Moreover, CASAC's charge to recommend new or revised NAAQS is explicitly tied to the standard-setting requirements of section 108 and 109(b), 42 U.S.C. 7409(d)(2)(B); nothing in section 109(d)(2)(c)(iv) purports to change those requirements.

"Productive capacity." Respondents in support of cross-petitioners also make the far-fetched claim that cost-benefit analysis is required by the Clean Air Act because the preamble

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responses to changes in the NAAQS. ATA Br. 40 (referring to "inexplicably premature" mandate of section 108(b)(1)).

to the Act identifies as one of the purposes of the statute the promotion of "the public health and welfare and the productive capacity of [the nation's] population." App. Pwr. Br. 29, quoting 42 U.S.C 7401(b)(1). This preamble language, which has been unchanged since the 1963 Clean Air Act,[50] does not even remotely support respondents' reading of it. The preamble makes clear that the population's health, welfare, and productive capacity are to be "promote[d]" by *"protect[ing] and enhanc[ing] the quality of the Nation's air resources"*–not by refusing to regulate in the face of demonstrable health risks. 42 U.S.C. 7401(b)(1).

D. Neither the Nondelegation Doctrine Nor Cross-Petitioners' Proposed Cost-Benefit Canon Can Override the Plain Meaning of the Statutory Language

No doubt insecure about their arguments based on the statutory text, cross-petitioners seek refuge in canons of statutory construction. The first canon cross-petitioners invoke is that of avoiding constitutional invalidation where a constitutional interpretation of a statute is available. The second is a new canon proposed by cross-petitioners which would inject a cost-benefit test into any environmental statute that did not use certain magic words in precluding such a test. Neither canon should be used to defeat the plain meaning of the Clean Air Act.

1. Because There Is No "Grave Constitutional Doubt" About the Clean Air Act, The Court Should Decline Cross-Petitioners' Invitation to Use the Nondelegation Doctrine as an Excuse to Rewrite the Statute

As we discussed in detail in our opening brief in *Browner v.*

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[50] *See* Clean Air Act of 1963, Pub. L. No. 88-206, § 1(b)(1), 77 Stat. 392, 393.

American Trucking Associations, Inc., No. 99-1257, the Clean Air Act, and EPA's interpretation of the Act, are plainly constitutional under this Court's precedents on delegation. MA & NJ Br. 28-43. Moreover, as set forth above, cross-petitioners' proffered interpretation of the Act is inconsistent with the plain meaning of the Act. Thus, by asking this Court to adopt their interpretation of the Act in order to avoid deciding the constitutional issue reached by the court below, cross-petitioners are inviting this Court to rewrite a statute in order to avoid deciding a straightforward and well-settled constitutional issue. The Court should decline to do so.

Just last Term, this Court affirmed "the guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 120 S.Ct. 1904, 1911 (2000), quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). Cross-petitioners' arguments fail each of the three requirements of the principle stated in *Jones:* as we established above, the Clean Air Act is not susceptible of two constructions; as we set forth in detail in our opening brief in *Browner v. American Trucking Associations*, precluding costs in the setting of the NAAQS does not raise "grave and doubtful constitutional questions"; and, finally, as discussed below, cross-petitioners' proffered interpretation(s) would not even avoid the constitutional question as they present it.

This case is before the Court because the court of appeals created a new requirement in the name of the nondelegation doctrine–one that demands that guidance for administrative action prescribe a quantitative "stopping point" for regulation. U.S. Pet. App. 11a. The problem for cross-petitioners and their supporters is that the various interpretations of the Clean Air Act they offer do not supply such a "stopping point."[51]

[51]Cross-petitioners and their supporters cannot even agree as to whether the Act *permits* or *requires* EPA to consider costs in setting the NAAQS (*compare* ATA Br. 32 *with* Inhofe Am. Br. 10), and thus cannot agree as to whether Congress itself made the most basic choice inherent in health and safety regulation–whether to balance human lives against economic costs. *Cf. Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in judgment).

Nowhere do cross-petitioners identify exactly what the cost-benefit balancing they desire would entail. Indeed, they offer the Court a virtual smorgasbord of possibilities (ATA Br. 30), ranging from analysis "under 'significant risk' and similar rubrics" to analysis based on "quality-adjusted life years" to the kind of cost-benefit analysis endorsed in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991), which required "identifying values for lost years of human life and for suffering and other losses from non-fatal injuries." *Id.* at 1320.

Quite apart from the administrative license created by cross-petitioners' failure to choose among the multitudinous ways in which costs can be taken into account in setting regulatory standards, none of cross-petitioners' analytical frameworks, even viewed in isolation, identifies a stopping point for regulation. An instruction from this Court telling EPA to consider quality-adjusted life years rather than lives lost, for example, would not tell EPA *how many* life years it should strive to save. It would, at most, tell the agency not to worry quite so much about the effects of air pollution on the elderly, the disabled, and the ill.

2. Cross-Petitioners' Proposed Cost-Benefit Canon Cannot Override the Plain Meaning of the Statute and Would Improperly Subvert the Legislative Process

As much as conceding the weakness of their arguments

based on the statutory language, cross-petitioners and their supporting respondents and amici urge this Court to adopt a new canon of construction. ATA Br. 46-47; App. Pwr. Br. 46-47; GE Am. Br. 18-22. The plainest statement of the content of this new canon appears in General Electric's brief: "[A] federal agency is *required* to consider costs and risk trade-offs in the absence of an express congressional statement *forbidding* the agency from doing so." GE Am. Br. 18. GE submits that this new requirement should apply only to "environmental and other regulatory statutes." *Id.* at 1.

Cross-petitioners and their supporters ask this Court, in other words, to adopt a canon of construction that licenses the rewriting of a particular category of statutes. This is a radical request, and one this Court should roundly reject.

Cross-petitioners' new canon would have this Court ignore the language of the Clean Air Act establishing that Congress deliberately excluded the consideration of costs from the process of setting the NAAQS. Because Congress did not, three decades ago, foresee this new canon and therefore did not then know that it must use certain explicit, magic words in excluding the consideration of costs, Congress's work could be undone. This is not a canon of statutory construction at all; it is a canon of statutory destruction.

Congress itself has, moreover, rejected an interpretive principle like the one recommended by cross-petitioners. Very recently, Congress considered and rejected bills that would have imposed what came to be known as a "supermandate" on agencies charged with protecting human health and the environment. This supermandate, like the canon proposed by cross-petitioners, would have applied a cost-benefit test to federal regulations. *See* H.R. 9, 104th Cong. § 422(a)(2), (b)(1) (March 10, 1995); S. 343, 104th Cong., § 629(a) (1995).[52]

[52]The brief of amici Environmental Defense, *et al.*, provides a detailed discussion of the extensive congressional debates over, and rejection of, generic cost-benefit tests for federal health and environmental regulation.

The question whether to apply a generic cost-benefit test to health and environmental regulation is a public policy decision of the highest order. Congress so far has not embraced such an across-the-board test. This Court should not wade into these politically charged waters by adopting the cost-benefit canon cross-petitioners propose.

II. Interpreting the Clean Air Act to Preclude the Consideration of Costs in Setting the NAAQS Does Not Lead to Irrational Results

At the end of the day, the real complaint of cross-petitioners and their supporting respondents and amici is that the Clean Air Act does not reflect "wise social policy." App. Pwr. Cross-Pet. 7. Their contention that the law is unwise, however, rests on a mischaracterization of the law in operation and is belied by three decades of success. Their argument, moreover, fundamentally misapprehends the role of this Court in relation to the Congress.

A. Precluding Cost-Benefit Balancing in Setting the NAAQS Will Not Lead to Deindustrialization

Throughout their briefs, cross-petitioners and their supporting respondents and amici suggest that precluding the consideration of costs in setting the NAAQS will force EPA to set standards for criteria pollutants at zero, thus effectively ending industrial activity in this country. They believe this result follows from the "nonthreshold" character of the criteria pollutants. Their argument betrays a deep misunderstanding of the concept of a nonthreshold pollutant. As a consequence, cross-petitioners seriously misrepresent EPA's degree of authority under the statute.

Cross-petitioners implicitly embrace a conception of

nonthreshold pollutants as pollutants that *have* been shown *not* to have a threshold, that is, pollutants that have been shown to have adverse effects on human health or the environment at every nonzero level. This is not EPA's conception of a nonthreshold pollutant.

When EPA discusses the possibility that particulate matter and ozone are nonthreshold pollutants, it is referring to the fact that these pollutants have *not* been shown to *have* a threshold, that is, it has not been demonstrated that these pollutants cease to have adverse effects on human health or the environment below a certain level. EPA does not claim to have proven that PM and ozone have adverse effects on human health at every nonzero level. *See* NAAQS for Ozone, 62 Fed. Reg. 38,856, 38,863 (1997); NAAQS for PM, 62 Fed. Reg. 38,652, 38,674-75 (1997). Thus, when EPA discusses the possibility that these are "nonthreshold" pollutants, it is referring to a *lack* of evidence that there *is* a threshold.

This *lack* of evidence would *not* be sufficient to support a NAAQS. The Clean Air Act requires the Administrator to present evidence of harm before she may set or revise the NAAQS. She may not set the NAAQS based on the *lack* of evidence of *no* harm. Section 108(a)(2) makes this point plain: the criteria on which the NAAQS are to be based must describe "all *identifiable* effects on public health or welfare." 42 U.S.C. 7408(a)(2) (emphasis added). Indeed, if EPA were allowed to set the NAAQS based on the lack of evidence of no harm, there would be no need to develop criteria documents at all, because EPA would not be required to show health effects before regulating. In such a regime, it would presumably be up to the regulated community to show the harmlessness of air pollution, rather than being up to the government to show its harmfulness. This is not the regulatory regime created by the Clean Air Act.[53]

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[53]In contrast, in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), this Court addressed the Occupational Safety and Health Administration's "cancer policy," which presumed that no safe level of carcinogenic substances existed and required workplace standards to be set based on this presumption. *Id.* at 624. EPA has not adopted this kind of presumption in setting the NAAQS.

As a consequence, cross-petitioners' claim that EPA is required to set pollutant levels at zero when faced with a nonthreshold pollutant is mistaken. ATA Br. 25. EPA is not required to set the NAAQS at zero for such pollutants because nonthreshold pollutants are not what cross-petitioners claim them to be; they are not pollutants that have been shown to be harmful at all nonzero levels, they are pollutants that have not been shown to be harmless at all nonzero levels. Indeed, if EPA did indeed attempt to set a NAAQS based on the lack of evidence of harmlessness rather than based on affirmative evidence of harmfulness, we expect that cross-petitioners would be first in line to challenge the agency's decision.

B. Precluding EPA from Considering Costs in Setting the NAAQS Does Not Allow the Administrator Privately to Consider Costs While Publicly Denying It

Cross-petitioners argue that EPA should be required to consider costs in setting the NAAQS because this would simply formalize an informal system that has developed in which the Administrator privately considers costs in setting the NAAQS while publicly denying she is doing so. ATA Br. 43-45. Their evidence for this allegation of unspoken but routinized illegality is altogether unpersuasive.

In addition to engaging in rank speculation about what Administrator Browner's private thoughts might have been during the PM and ozone rulemakings at issue here, ATA Br. 44, cross-petitioners assert that Administrators Costle and Ruckelshaus considered costs in NAAQS rulemakings

undertaken during their tenures at EPA. But both Costle[54] and Ruckelshaus[55] were careful to ensure that their final decisions were not based on statutorily proscribed factors.

In both instances, to be sure, as cross-petitioners' sources note, the Administrator (or, in Ruckelshaus's case, EPA staff) had before him information on the costs of implementing the standards he was in the midst of setting.[56] This demonstrates nothing. In NAAQS rulemaking proceedings, EPA is commonly confronted with information on costs even though it has repeatedly denied the relevance of this information.[57] Moreover, EPA is charged at once with setting and with implementing the NAAQS. As emphasized throughout this brief, it is perfectly appropriate for EPA to consider costs in implementing the NAAQS. Because the process of implementation begins straight on the heels of setting the NAAQS, an Administrator will naturally have before her information on the implementation of standards even as she sets them. Indeed, as cross-petitioners have emphasized, EPA

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[54]Mark K. Landy, *et al.*, *The Environmental Protection Agency: Asking the Wrong Questions from Nixon to Clinton* 70 (1994). Indeed, Costle rejected the standard recommended by economic advisors hostile to the Clean Air Act's prohibition on the consideration of costs. As Landy, whose account of Costle's deliberations forms the basis of cross-petitioners' speculations, summarized it: these economic advisors "could argue about the statute as much as they wanted, Costle felt, but they could not fault him for following it." *Id.* at 73.

[55]ATA Br. 44.

[56]*See* Landy, *supra*, at 67-70 (Costle's decision); Thomas O. McGarity, *Reinventing Rationality* 47-48 (1991) (Ruckelshaus's decision).

[57]In fact, respondents and amici supporting cross-petitioners obtain their outsized estimates of the costs and other consequences of the revised PM and ozone NAAQS from comments placed in the docket in the rulemakings at issue here. *See* App. Pwr. Br. 4, n. 4; *id.* at 18, n. 45; GE Am. Br. 9.

must issue information on the costs and feasibility of control measures "simultaneously with" issuing the criteria documents on which the NAAQS are based. 42 U.S.C. 7408(b)(1).

So long as, in setting the NAAQS, the Administrator excludes the cost information from her determination, the statutory mandate is satisfied. There is absolutely no grounds in the record before this Court to presume that any Administrator has ever violated that clear duty.

Equally important, the possibility that an Administrator will act unlawfully by considering factors that are statutorily proscribed is not reason to rewrite a statute to take account of those factors. If an Administrator were ever to consider statutorily proscribed factors in setting a NAAQS, resort could be had to the judicial process and to the standard allowing an agency action to be overturned if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. 706(2)(A).

C. Congress Acted Rationally in Precluding EPA from Considering Costs in Setting NAAQS While Allowing EPA to Consider Costs in Implementing Them

Respondents argue that precluding the consideration of costs in setting the NAAQS defeats the public-health purposes of the Act by imposing regulatory costs that harm people's health. App. Pwr. Br. 18. In addition, cross-petitioners assert that EPA cannot reasonably maintain a distinction between the consideration of costs in setting the NAAQS and the consideration of costs in implementing them. ATA Br. 45-47. Neither claim has merit. Not only did Congress sensibly address the potential tradeoffs between regulatory costs and health, but the distinction between setting the NAAQS and implementing them has served federal air pollution control efforts well.

Respondents and amici supporting cross-petitioners seek to

convince this Court that interpreting the Act to forbid EPA to consider the health effects of the economic consequences of regulation in setting the NAAQS would be irrational. In fact, their briefs repeatedly suggest that people will die if EPA is allowed to set the NAAQS without balancing costs against benefits. According to the respondents and amici supporting cross-petitioners, anywhere from approximately 3,000 to 27,000 people will die as a result of the *costs* of the revised PM and ozone standards.[58]

There is not one bit of empirical evidence supporting these outlandish claims. Cross-petitioners' supporters cite no empirical study on the effect of the costs of any actual regulation on human health, let alone any empirical study on the effect of the cost of *these* standards on human health.[59] Instead, they refer to two sets of controversial studies which, based on abstract, theoretical economic models, purport to find a generalizable relationship between regulatory costs and human mortality. These studies are filled to the brim with controversial assumptions about the income-depressing effects of regulation, the effects of wealth on health, and even the value of a human life.[60]

Suffice it to say that respondents' and amici's unqualified assertions about the relationship between the costs of public

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[58]*See* Mercatus Center Am. Br. 19 n. 14; App. Pwr. Br. 18.

[59]Indeed, respondents' risk estimates are based on cost estimates that themselves are wholly unsubstantiated. App. Pwr. 18 n. 45.

[60]Respondents and amici rely on: Ralph L. Keeney and Kenneth Green, *Estimating Fatalities Induced by Economic Impacts of EPA's Ozone and Particulate Standards* (1997) (unpublished paper available on web page of Reason Public Policy Institute); Ralph L. Keeney, *Mortality Risks Induced by Economic Expenditures*, 10 RISK ANALYSIS 147 (1990); and Randall Lutter, John F. Morrall, III, & W. Kip Viscusi, *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulatons*, 37 ECON. INQUIRY 599 (1999).

health regulation and public health itself are subject to extremely serious empirical and normative criticisms. However, this Court is not the forum for resolving these complex empirical and normative issues; rather, Congress is the "preferable forum for comprehensive investigations and judgments of social value." *Pegram v. Herdrich*, 120 S.Ct. 2143, 2150 (2000). And, in the Clean Air Act, Congress has resolved these issues by prohibiting EPA from considering costs in setting the NAAQS but allowing the agency to consider costs in implementing them. Indeed, Congress specifically provided limited, targeted escape valves allowing departures from the requirements of the Act where significant economic disruptions or unemployment would otherwise result. *See, e.g.*, 42 U.S.C. 7410(f)-(g). This was a perfectly reasonable and rational response to the complex empirical and normative issues raised by the prospect that ceasing economic activity that "endanger[s] public health and welfare," 42 U.S.C. 7408(a)(1)(A), might lead to a loss in income.

Congress's distinction between the factors relevant to setting the NAAQS and those relevant to implementing them is similarly reasonable. Contrary to cross-petitioners' claims, the Clean Air Act's NAAQS program has been a large-scale success. From a purely environmental perspective, the program has resulted in a substantial absolute reduction in emissions of almost all of the criteria pollutants.[61] But what is most striking is that these reductions have occurred alongside significant increases in population and economic activity. The quality of the ambient air Americans breathe every day has improved dramatically while the economy has expanded and our national wealth has increased. In the absence of the controls imposed by the Clean Air Act, those increases in economic activity would undoubtedly have been accompanied by a significant worsening of air quality.

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[61]*See* Andrews, *Managing the Environment, Managing Ourselves*, *supra*, at 280.

Even from the perspective of a traditional economic analysis, the success of the Clean Air Act cannot fairly be gainsaid. According to EPA's peer-reviewed economic analysis, the reductions in emissions of air pollutants have most likely produced *trillions of dollars* more in benefits than they have imposed in costs.[62] A congressionally mandated study of the Clean Air Act's benefits and costs, published last year, anticipates that the benefits of the Act between 1990 and 2010 will exceed the costs by a ratio of 4 to 1.[63]

The Clean Air Act reflects Congress's central insight that the best way to achieve such dramatically positive results was *not* to base the nation's objectives for environmental quality on prospective cost-benefit analysis. Congress understood the pitfalls presented by basing environmental objectives on cost-benefit analysis in the first instance rather than taking such concerns dynamically into account at later stages, while implementing controls to achieve those objectives.

Because of the proclivity of cost-benefit analysis for quantification and commensuration, cost-benefit analysis tends to highlight those costs and benefits that can be both quantified and stated in terms of a common metric, such as dollars. It follows that cost-benefit analysis tends to underrate those things that cannot be so quantified and monetized; it tends, in Professor Tribe's famous formulation, to "dwarf[] soft variables."[64]

This feature of cost-benefit analysis makes it a particularly unhelpful analytical framework for setting air quality standards under the Clean Air Act. While a retrospective cost-benefit analysis may, like that done with respect to the Clean

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[62]*See* EPA, *The Benefits and Costs of the Clean Air Act, supra*, at ES-8.

[63]EPA, *The Benefits and Costs of the Clean Air Act 1990 to 2010*, v (1999).

[64]Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 Yale L.J. 1315, 1318-19 & n.25 (1974).

Air Act, demonstrate the wisdom of policy choices decades after those choices were made, a prospective cost-benefit analysis might have discouraged a policymaker from making those very same choices in the first instance.

On the cost side, for example, it is very difficult accurately to estimate the consequences of a *technology-forcing* regulatory requirement before that requirement has forced any technology. It is much easier to assume that the technology used to implement the new requirement will be the same as, and cost as much as, the technology that existed before the requirement was imposed. And indeed, this is the approach taken by EPA when it has, as it is obliged to do by Executive Order, tried to estimate the costs of the NAAQS. With respect to the rules at issue here, EPA thought its cost estimates would prove significantly overstated because of the likely effects of technological innovations.[65] But it could not quantify these effects, and so they do not show up in its economic analysis.

Likewise, with respect to benefits, the empirical and normative complexity of quantifying and monetizing the benefits of good health, long life, and fresh air are well known. When these benefits cannot be quantified or monetized, they do not amount to much in cost-benefit analysis.[66] Even when they can be both quantified and monetized, an important normative shift occurs when the analyst begins to ask not how clean must the air be to protect public health but how much

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[65]*See* Office of Air Quality Planning and Standards, Environmental Protection Agency, Regulatory Impact Analyses for the Particulate Matter and Ozone NAAQS and Proposed Regional Haze Rule at 9-2 to 9-4 (1997).

[66]*See, e.g., Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1219 (5th Cir. 1991) (dismissing importance of unquantified benefits of banning asbestos in course of disapproving EPA's cost-benefit analysis of the ban).

would citizens pay to make it so.[67]

Under the Clean Air Act, then, prospective cost-benefit analysis of the kind cross-petitioners endorse would tend to have the following effect: it would tend to overestimate costs (because it could not adequately account for technological innovation) and underestimate benefits (because so many important things cannot be counted). The result would likely be a systematic tendency toward underprotection of the health and welfare central to the Act.

Congress decided in the 1970 Clean Air Act to respond to the inherent uncertainties of cost-benefit analysis and its tendency to compromise environmental objectives by excluding its consideration from the setting of NAAQS. No doubt this was "drastic medicine,"[68] but Congress had declared a "war against air pollution,"[69] and it knew that wars are not won by setting one's sights as low as possible.

Of course, the question before the Court is not ultimately whether the Court believes, as we do, that Congress acted wisely in 1970 in deliberately deciding not to compromise its national goals for clean air based on cost-benefit analysis. For the Constitution wisely entrusts Congress with the responsibility for making those important policy determinations. Cross-petitioners' exclusive remedy remains now, as it has been for the past thirty years, in the legislature and not the courts.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as the court held that the Clean Air Act precludes EPA from considering costs in setting the NAAQS.

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[67] *Cf.* Tribe, *supra*, at 1329-32.

[68] 116 Cong. Rec. 32, 904 (Statement of Sen. Muskie).

[69] H.R. Rep. No. 91-1146, at 1 (1970).

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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENTS CITIZENS FOR BALANCED TRANSPORTATION, RICHARD ROMERO (on behalf of himself and his minor son, Richard Romero, Jr.), DAVID MATUSOW, BRIAN McCARTHY, JAMES BASSAGE and MICHAEL GREGORY

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INTRODUCTION

ATA challenges the D.C. Circuit's 20-year-old affirmation of the EPA Administrator's long-standing construction of Clean Air Act § 109(b) that Congress chose not to allow costs as a factor relevant to setting national ambient air quality standards. The "trilemma" of possible interpretative options posed by American Trucking is based on a false trichotomy. ATA Br. 25. The more appropriate, and more fundamental question underlying a correct construction of the Act is whether Congress intended to 1) delegate to an unelected administrator the responsibility and authority for making the tradeoffs between protecting human health from the adverse effects of air pollution and the costs of protecting health, or 2) retain for itself the authority to make such tradeoffs?

Chief Justice Rehnquist wrote in the Benzene case that "one of the most difficult issues that could confront a decisionmaker [is] whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths," and "that Congress [is] the governmental body best suited and most obligated to make the choice. . . . " *Industrial Union Dept. v. American Petroleum Inst.*, 448 US 607, 672 (1980). Here, respondents Citizens for Balanced Transportation and the individuals who brought their challenge to EPA's failure to set an adequately protective standard for fine particles in order to protect their ability to breathe and lead healthy productive lives, contend that Congress clearly chose not to empower the EPA Administrator to make such life and death tradeoffs. Instead, all the reliable indicators of legislative intent lead inexorably to the

conclusion that Congress reserved such authority exclusively to itself.

> *[I]n the judgment of this committee – this includes Senators . . . of a pretty conservative political persuasion – Congress has the duty to say,* "This is what ought to be done in the interests of the health of the country."
>
> * * *
>
> *Then industry should go to work over the next 5 years to either make it possible or, if it proves to be impossible, ask Congress to change the policy.*
>
> * * *
>
> *That is all there is here, and it is tough. [W]e understand it is tough.*

Senator Muskie, Chair of the Senate Subcommittee on Air and Water Pollution and chief sponsor of the Clean Air Act Amendments, in floor debate on the committee bill, September 21, 1970. "A Legislative History of the Clean Air Act Amendments of 1970" (January 1974) ("Leg. Hist."), 240.

SUMMARY OF ARGUMENT

The statutory directive to set NAAQS that are "requisite to protect the public health," with "a margin of safety," is a directive to set standards that will protect the American people from the diseases of air pollution. Application of the traditional tools of statutory construction demonstrate that costs are not a factor that Congress has allowed to be considered in setting standards to protect the public health.

The 1970 Amendments to the 1967 Air Quality Act, the legislative history, the pre-enactment administrative actions incorporated into the Act by reference, the meaning of public health derived from the statements of the members, prior agency interpretation and the meaning of the term under the police power, the overall statutory scheme, the problem to be solved and the historical context in which the Amendments were enacted, and various subsequent enactments affirming the 1970 Amendments and granting temporary relief from deadlines, but not the health standards, when Congress determined the economic consequences of implementing the Act to be unacceptable, all demonstrate that Congress required EPA to set standards based exclusively on "the latest scientific knowledge" of the effects of air pollution on health. The Act does not authorize EPA to make tradeoffs between costs and the protection of public health when setting NAAQS. On the contrary, the history of the Act makes clear that Congress reserved to itself the sole power to decide whether to postpone protecting the public health in order to serve other societal interests.

Thirty years of still-evolving economic theories of regulation and the hindsight of the social, economic and public health costs and benefits of implementing the Act's standards do not provide a permissible basis for imposing a judicial gloss that transfers to a politically unaccountable agency a policy choice Congress reserved to itself.

Whether evidence of a threshold for fine particles is ultimately discovered or not, the non-threshold status of a pollutant is not relevant to determining Congress's intention with regard to consideration of costs. Congress

rejected the no-effects, or zero risk, approach to setting standards. Instead, Congress required standards to prevent "adverse effects" based on the "latest scientific knowledge," granted the Administrator discretion to determine what an adverse effect is, and delegated broad latitude to set margins of safety provided that such protection could be demonstrated to be "requisite to protect the public health."

The Court of Appeal's construction that costs play no role in setting standards under § 109 should be affirmed.

ARGUMENT

Certiorari in this case is limited to the question of statutory construction decided by the Court of Appeals in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980). Nonetheless, industry parties raise questions related to the scientific basis for EPA's choice of standards, argue that EPA failed to explain its choice of standards within the continuum of options considered, rely on academic notions of what makes good public policy with regard to how costs should be weighed in these types of decisions, and ask the Court to make judgments about the wisdom of EPA's standards. In making these arguments, ATA and others would have this Court exceed its proper role by asking that it weigh more heavily the policy preferences of some economists and those industries that bear the costs of protecting public health from the adverse effects of their pollution than the policy choice made by

Congress as evinced by traditional tools of statutory construction.

> In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy. See TVA v. Hill (citations omitted). *Industrial Union Dept. v. American Petrol. Inst.*, at 688 (Marshall, J. *dissenting*).

In addition, ATA raises issues that are properly addressed as arbitrary and capricious claims. Suggestions that EPA has failed to adequately explain its choice of standards or has improperly relied upon off-the-record considerations of cost are not relevant to deciding Congress's intent in enacting § 109. These issues are, however, highly relevant to the arbitrary and capricious challenge brought below and in this Court by Citizens for Balanced Transportation and the individual petitioners who seek to protect what statutory rights they have to standards that will ensure the air they breathe is safe and will not impair their health. If the Court deems those issues appropriate for review, CBT invites the Court to grant its still pending petition for certiorari. See No. 99-1442. But these issues are not properly presented for decision based on the question of statutory construction raised in ATA's petition and certified in this case.

To the extent the Court considers ATA's policy arguments relevant to this case, the Court should also consider what the consequences of making tradeoffs between costs and health protection might be. In addition to the sensitive populations of breathers whose well-being, vitality, productivity, and very survival are required to be protected, many other interests benefit from EPA's traditional approach to standard setting. Not the least of these are most of the polluting industries challenging these standards who are now protected by a measure of certainty that they will not be the targets of perpetual damage and other tort claims based on evidence that their emissions harm human health. We explore some of these benefits, *infra*, to demonstrate the wisdom of Congress' decision to settle, periodically, in one national proceeding the levels of air quality needed to protect the public from scientifically provable harm. All these beneficial interests must be weighed in the balance if they are considered at all.

I. STATUTORY ANALYSIS INDICATES CONGRESS DID NOT AUTHORIZE EPA TO CONSIDER COSTS AS A RELEVANT FACTOR IN SETTING NAAQS.

In this case, the traditional tools of statutory construction clearly demonstrate that Congress did not delegate to EPA authority to consider costs as a factor that might be used to offset the degree of health protection to be required by national air quality standards. The relevant and probative indicators of legislative intent include –

- The amendments to the Act from 1967 to 1970;
- the discussion of factors relevant to setting standards in the legislative history;
- the administrative practice applying the public health mandate of the 1967 Act as embodied in the pre-enactment criteria documents;
- the statutory directive to set the new NAAQS based on the pre-enactment criteria documents which did not include considerations of cost;
- the intended meaning of "public health" as revealed by congressional hearings and debates;
- the commitment of the common law and the scope of the police power to protect public health as the underlying legal context for congressional action;
- the historical context and the problem Congress was trying to solve;
- the specific identification of costs as relevant to some standards but not to standards under § 109; and
- subsequent enactments that affirm § 109 as originally enacted and that provide temporary relief to specific industries that were considered by Congress to be especially burdened with the costs of compliance.

Together, these all point consistently and inexorably to the conclusion that Congress retained the ultimate authority to make any tradeoffs between health protection and the public and private costs of providing health protection.

A. The 1970 Amendments

The 1970 Amendments made two key changes to the Clean Air Act that demonstrate the error of petitioners' arguments: 1) repeal of the technology factor listed in § 108(c)(1) of the 1967 Act requiring that air quality standards adopted and submitted to HEW for approval be "consistent with the air quality criteria *and recommended control techniques* issued pursuant to section 107" (emphasis added), along with the failure to include any similar instruction to the Administrator to consider control techniques or costs in the 1970 language of § 109(b); and 2) repeal of the requirement in 107(b) of the 1967Act that information on control technology and costs of control be issued to the States whenever the Secretary issued air quality criteria.

1. 1970 Act Repealed Control Techniques As a Relevant Factor.

Petitioners' textual argument relies heavily on the contention that the Administrator's obligation under § 108(b) to provide information to the States on available technology and costs demonstrates that these factors are relevant to the NAAQS decision. But this argument does not survive scrutiny.

First, the 1967 Act made "recommended control techniques" expressly relevant to the setting of standards by the States, § 108(c)(1), but did not allow technology factors to override the primary objective of protecting public health. The 1967 Act required that the air quality standards adopted by the States meet both tests, i.e., be "consistent with the air quality criteria and recommended

control techniques. . . . " *Id.* The 1967 Act did not authorize the Secretary to consider costs in approving air quality standards; only the criteria and "recommended control techniques" were identified as relevant factors. Nor did the 1967 Act authorize the Secretary to approve air quality standards if they were consistent with available technology, but not the air quality criteria. Both had to be met to receive federal approval.

As Commissioner Middleton of the National Air Pollution Control Administration ("NAPCA"), an agency of the Department of Health, Education and Welfare ("HEW"), explained to the Senate committee in 1970, the Administration was implementing the 1967 Act by requiring that "[t]he criteria documents state the level at which effects begin. . . . The Clean Air Act provides that the standards shall be protective of health, which means they must be lesser than the level at which this thing [effect] was observed." Leg. Hist., 1185. As an example, he pointed to the evidence in the Air Quality Criteria documents for SO2 and particulate matter showing the lowest levels at which adverse effects were observed for each pollutant, and explained that "[s]tandards that are acceptable to the Secretary are those less than that number." *Id.*, 1187.

The Administration's implementation of the 1967 Act did not allow for tradeoffs between the recommended control techniques and standards adequate to protect against the lowest pollution levels proven to cause adverse effects. Rather, the best reading of the 1967 Act is that both of the statutory factors had to be satisfied, i.e., that the Secretary could disapprove a State's standard if it failed to either require air quality cleaner than levels

proven to cause harm, or if the State failed to take advantage of the levels of control that could be achieved with recommended control techniques. But nothing in the 1967 Act or its implementation by HEW suggested that either the private costs incurred by polluters or the public costs of control were relevant to setting air quality standards.

In the 1970 Act, Congress deleted the requirement that standards be based on considerations of control technology; "recommended" or otherwise. The only relevant factors that remained in the text of § 109(b) for setting primary standards were "requisite to protect the public health," "allowing a margin of safety," and basing the standards on the "criteria." Factors mentioned for secondary standards include "requisite to protect the public welfare" which Congress defined in § 302(h), "known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air," and basing the standards on the "criteria."

2. Pre-1970 Criteria Show Congress Did Not Intend Costs to be Relevant.

There is no basis for the inference petitioners attempt to draw that reference to the "criteria" itself imports some notions of cost into the realm of factors relevant to setting standards. The nature and scope of the five "Air Quality Criteria" documents was known to Congress. NAPCA issued the "Air Quality Criteria" for SO2 and PM in January 1969, and the Criteria for photochemical oxidants (including ozone), hydrocarbons and carbon monoxide were issued in March 1970, only weeks following the President's message proposing amendments to the Act.

The criteria documents were mentioned in committee hearings and floor debates by Senator Muskie and other members, and explained at committee hearings by Commissioner Middleton and other representatives of the Administration. Review of these criteria documents reveals that they contain no discussion of control techniques or costs except for the economic costs caused by pollution in the ambient air. Nothing in the criteria documents or the discussions of them by members or hearing witnesses would have led any member of Congress to believe that reference in the Act to "criteria" incorporated a subtext that was understood to mean "costs."

Furthermore, the 1970 Act directed the Administrator to "publish proposed" primary and secondary NAAQS within 30 days following enactment of the Amendments "for each air pollutant for which air quality criteria have been issued prior to such date of enactment." § 109(a)(1)(A). Final NAAQS were required 90 days thereafter. § 109(a)(1)(B). EPA met these deadlines. Obviously, Congress knew enough about the content of the pre-enactment air quality criteria to require that standards be issued based on them. No time was allowed for further criteria development. Nor was there any suggestion that criteria that omitted all consideration of costs were inadequate to support the promulgation of national standards.

3. 1970 Act Repealed Requirement to Revise Control Technique Information When NAAQS Are Revised.

In addition, Congress removed the linkage between information on control techniques and any future

revisions to the NAAQS. Section 109(b)(1) allowed the Administrator to "revise[ ]" standards "in the same manner as promulgated," which required only that they be based on the "criteria." The inference in the 1967 Act that future revisions to the criteria be coupled with the issuance of revised technology and cost information was removed. The new § 108(c) required only that "[t]he Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria *or* information on control techniques. . . . " The disjunctive eliminated any obligation to reissue control technique information when the air quality criteria were revised.

The only linkage that remained in the 1970 Act between the issuance of control technology information and the issuance of criteria or the proposal of NAAQS was when new criteria required by § 108(a)(2) were issued following the listing of a new pollutant under § 108(a)(1). See § 108(b)(1). This provision has been triggered only twice by EPA's listing of nitrogen oxides in 1971 and lead in 1976 as new criteria pollutants. Revisions of a NAAQS, such as the standards at issue here, no longer trigger an obligation to issue revised information on control techniques and costs.

But even this last vestige of the prior link between technology information and standards cannot reasonably be read to imply that control technique information was ever relevant to the NAAQS decision. Congress directed the Administrator to issue the information to the States and air pollution control agencies, not to use it himself for any responsibility he had under the Act. Obviously, this provision carries over from the 1967 Act when such information was relevant to both standard setting and the

development of abatement plans by the States. After the 1970 Amendments, the information continued to be relevant only to the States' obligation to develop emissions standards as part of the State implementation plans required by § 110. The Act no longer made it relevant to setting air quality standards.

Certainly, Congress understood that continuing to provide control technology information was to support the States' efforts to develop implementation plans: "The Committee recognizes that the States will continue to need this information to develop meaningful programs for implementation of ambient air quality standards on a regional basis. * * * The Committee intends that the information provided pursuant to this section should serve as guidance to the States, not as limitations on control technology innovation." S. Rep. No. 91-1196 (1970), 9 (Leg. Hist., 409). Nothing in this history suggests that this information was intended to be relevant to the Administrator's NAAQS decision.

Taken together, these many changes to the statutory requirements governing promulgation of air quality standards, issuance of criteria and information on control technology and costs make clear that Congress intended that NAAQS decisions be based solely on the kinds of health effects information contained in the pre-enactment air quality criteria. Nothing in the statutory text, or Congress's express reliance on the pre-enactment air quality criteria for setting the new NAAQS, suggest any hint of requiring EPA to expand the scope of criteria documents to include information on factors other than "the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such

pollutant in the ambient air, in varying quantities." § 108(a)(2). To the extent that costs might have been a relevant factor for setting air quality standards under the 1967 Act, the 1970 Act removed any linkage between national air quality standards and costs or technology as relevant factors.

B. "Public Health" Was Uniformly Understood as Impairment of "Human Health" by the Diseases of Air Pollution; Not Costs.

Petitioners' other textual argument from the 1970 Act is that the phrase "requisite to protect the public health" itself imports the notion that costs may be considered to justify standards that fail to protect against significant adverse health effects.[1] This notion may derive its philosophical basis from *1984*, but one must hope that such

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[1] Some of the parties and *amici* supporting ATA reject this extreme view, and acknowledge that there are limits to how far costs can be relied upon to diminish the levels of health protection a NAAQS must provide. Appalachian Power, at 25, concedes that even under an interpretation of "public health" that incorporates costs, a distinction must be made between "demonstrated adverse" health effects and predicted risks of harm. "NAAQS must be set below the level at which such demonstrated adverse public health effects occur." Similarly, Senator Hatch and Congressman Bliley, at 23, accept the view adopted by the *en banc* D.C. Circuit in *Vinyl Chloride* that "The Administrator would not comply with section 109 by setting a standard that did not protect against the level where scientific data demonstrate a significant risk to the public health; she would have failed to set a standard 'requisite to protect the public health.' "

Orwellian twists of phrase have not become the stuff our laws are made of.

If such an understanding of the term "public health" were so in vogue in 1970 as petitioners would have the Court believe, one would think that somewhere in the 1600 pages of compiled legislative history there would be an inkling that someone – the President perhaps, or an administration official, or an erudite member of Congress from Massachusetts – shared this view. But it is a telling commentary that after all the citations to obscure journals and academic treatises, petitioner ATA's entire brief contains only one citation to the legislative record from 1970. Br. at 42, n.2. And that citation is not to anything Congress did, but to the first annual report of the President's Council on Environmental Quality which provided one of the estimates of the cost of air pollution control available to Congress.

But CEQ's report also identifies the need to make those expenditures to prevent the "threat to human health," to address "the primary public health concern", to reduce pollution where "adverse health effects have been observed." Leg. Hist., 246-47. The term "public health" was used interchangeably with other similar terms throughout the CEQ report, and throughout the legislative history. A typical example of how the phrase was used by CEQ is shown in this summary of 20th Century disease trends:

> The incidence of chronic diseases has soared sharply during this century, while the infectious diseases which were the primary public health concern in the past have been brought under control. Heart and blood vessel diseases caused

> more than half the deaths in the United States in 1962. Lung cancer, once a rarity, now kills more persons than all other cancer types combined. Emphysema has doubled every 5 years since World War II. Air pollution has been linked to asthma, acute respiratory infections, allergies and other ailments in children. Leg. Hist., 246.

"Public health" was short-hand for a collection of terms that were generally used to communicate the concept that the health of a large number of people is affected by causes that are associated with conditions beyond the control of individuals.

1. "Public Health" As Congress Used the Term.

Ultimately, the inquiry should turn on how members of Congress used and understood the phrase in their discussions. There is no evidence that Congress understood it to include even the public costs of protecting health. It certainly was not understood to include the private costs of pollution control.

When Senator Muskie, chair of the Air and Water Pollution subcommittee and principal sponsor of the bill, introduced the committee bill on the floor, he used a number of terms referring to public health interchangeably. He made clear that the philosophy of the bill rejects "[p]redictions of technological impossibility or infeasibility . . . as reasons to avoid tough standards and deadlines, and thus to compromise the **public health**." Leg. Hist., 229. He quoted from the Senate report on the 1967 Act which declared that "the nation's air resources

are to be conserved and enhanced to the point that generations yet to come will be able to breathe without fear of **impairment of health**." *Id.* The bill, he explained, represents a commitment by Congress to "effective protection of the **health of all Americans**." *Id.*, 230. It "is not too soon to be concerned about the **health effects** of automobiles on the lives of the people. . . . " *Id.*, 232. "Here, in the case of a national objective more serious than [building war planes or sending a man to the moon] – the **national health**, we have an obligation to lay down the standards. . . . " *Id.* None of these terms were used to imply a subtext that includes cost. On the contrary, the consistent theme throughout the legislative process was that costs and technology should not be factors because they would delay a solution to the air pollution problem.

This is most clearly revealed in the crucial floor debate over the provisions forcing the auto industry to meet tailpipe standards that demanded a 90% emissions reduction beyond the standards issued under the 1967 Act; a level of reduction demonstrated only with experimental vehicles. Leg. Hist., 233-40. Senator Griffin of Michigan challenged the technology-forcing auto tailpipe standards because the result could be the shutdown of an industry that accounts for 1 of 7 jobs nationwide, and because the costs of producing clean production-line vehicles were unknown and "would not be taken into account." *Id.*, 237-40. In response, Senator Muskie admits "I do not think anyone knows [what this will cost]." *Id.*, 238. But he defends the bill by summarizing the evidence of health effects from the criteria document for carbon monoxide (a pollutant emitted almost entirely by motor vehicles), and then explains: "We are saying in this bill

that this is what the **public health** requires." *Id.*, 236. "[O]ur responsibility is to tell the industry what the **public health** requires." *Id.*, 238. "The deadline is based not on economic and technological feasibility, but on considerations of **public health**." *Id.*, 239.

This debate, more than any other evidence of intent from the 1970 history, demonstrates that the cost factors now argued by petitioners to be included within the alleged common understanding of public health, were understood then to be in conflict with the commonly understood meaning of public health. Senator Griffin argued for including authority in the bill to allow an expert agency to consider cost and technology when setting or adjusting standards and deadlines. But Senator Muskie clearly rejected inclusion of those factors because they conflicted with achieving protection of the public health. If petitioners' view of the Act were right, Senator Griffin would have had no reason to oppose the bill.

Although this debate centered on the tailpipe standards of the Act and not the NAAQS, it is nonetheless probative of how Congress viewed the term "public health." It is also relevant to construing § 109(b)(1) because the technology-forcing policy underlying the tailpipe standards was embodied in the NAAQS language as well. As Senator Muskie made clear when he presented the committee bill, "it is now clear that continued reliance on gradual reductions in automotive emissions would make achievement of the ambient air quality standards impossible within the national deadlines established in Title I of this act." Thus both the NAAQS and the tailpipe standards reflected the philosophy of the bill that rejected

"[p]redictions of technological impossibility or infeasibility . . . as reasons to avoid tough standards and deadlines, and thus to compromise the **public health**." Leg. Hist., 229.

Similar remarks were made by other members indicating that Senator Muskie's understanding that public health was short hand for human health was shared widely. Senator Nelson: "This bill before us is a firm congressional statement that all Americans in all parts of the Nation should have clean air to breathe, air which does not attack their health." *Id.*, 378. Senator Randolph, chair of the Public Works Committee: "The pending bill would require the establishment within 3 to 5 years of its enactment State implementation plans to achieve national ambient air standards to protect the health of citizens of this country." *Id.*, 286. Senator Murphy: " . . . the air pollution problem is . . . a menace to the health and welfare of our people." *Id.*, 329. Senator Scott, minority leader: "Unless this outpouring of contaminants is controlled, . . . we may very well experience . . . a snowballing adverse effect to the health and safety of our citizens." *Id.*, 349. Senator Young: " . . . within 5 years, the air in our cities will be fit to breathe, no longer endangering the health of our citizens."

The kinds of health effects that members talked about are also important to their understanding of public health. They referred to the health effects discussed in the CEQ report – lung cancer, bronchitis, asthma, cardiovascular disease – ; not the health effects attributable to unemployment or the "poverty effect" on health. Senator Murphy, for example, cited numerous scientific journal articles as well as reports from the popular press linking

these kinds of adverse effects to air pollution. *Id.*, 326-27. Members also quoted studies reported in NAPCA's criteria documents, such as the evidence that carbon monoxide exceeded safe levels in Chicago more than 20% of the time. *Id.*, 236.

Members clearly understood the threat of air pollution to public health to be the diseases experienced by people as a result of their exposure to pollution. With this understanding of "public health," this term cannot be distorted into the vehicle for making costs relevant to setting NAAQS.

2. "Public Health" As the Agency Applied the Term.

The phrase "requisite for the protection of the public health" was not new to the 1970 Act. It was carried over from § 107(b)(1) of the 1967 Act which established the statutory benchmark for issuing air quality criteria to the States. The interpretation of "public health" by the agency charged with carrying out this mandate provides reliable evidence of what Congress most likely intended in 1967, and compelling evidence of how Congress would have expected the term to continue to be applied under the amended Act. The five Air Quality Criteria issued prior to enactment of the 1970 Amendments provide the best evidence of how the Secretary of HEW understood the meaning of "public health."

Most relevant here are the "Air Quality Criteria for Particulate Matter" and the "Air Quality Criteria for Sulfur Oxides," the first two to be issued under the 1967 Act. In both documents, in the Preface, at iii, NAPCA Commissioner Middleton wrote:

> Air quality criteria tell us what science has thus far been able to measure of the obvious as well as insidious effects of air pollution on man and his environment. Such criteria provide the most realistic basis that we presently have for determining to what point the levels of pollution must be reduced if we are to protect the **public health** and welfare.

The Introduction to both Criteria, PM at xiii and Sulfur Oxides at x, which were required by the 1967 Act to determine what is "requisite to protect public health," explain that

> Air quality criteria are an expression of the scientific knowledge of the relationship between various concentrations of pollutants in the air and their adverse effects on man and his environment. * * * Air quality criteria are descriptive; that is, they describe the effects that have been observed to occur when the ambient air level of a pollutant has reached or exceeded specific figures for a specific time period. * * *
>
> Technological and economic aspects of air pollution control are considered in companion volumes to criteria documents. [See] *Control Techniques for Particulate Air Pollutants* [or *Sulfur Oxide Air Pollutants*].

These documents clearly reveal that HEW considered only the evidence of harm to humans that was attributable to levels of pollution in the ambient air as relevant to its task of providing the information "requisite to protect public health." The separation of health effects information into the criteria and cost information into control

techniques documents also show that information regarding cost was not included in the criteria, and not considered relevant to determining what is "requisite to protect public health."

This agency approach to the development of air quality criteria and approval of standards was consistently applied to the remaining criteria issued prior to the 1970 Amendments. During consideration of the Amendments, no member questioned the agency's approach to developing the information relevant to the standard setting decision. When Congress enacted into the new §§ 108(a)(2) and 109(b)(1) language that required protection of public health – indeed, language that closely paralleled the language in the 1967 Act – the only reasonable inference is that Congress also intended to retain HEW's understanding that "public health" meant only the adverse effects of pollutants on human health.

3. The Law's Understanding of "Public Health."

As a term of art, "public health" had then, and continues to have, a special meaning in the law. For nearly two centuries, the common law has treated conduct or uses of land that "involve a significant interference with the public health" as a public nuisance. Restatement (2d) of Torts, § 821B. In constitutional jurisprudence, this Court has recognized the protection of public health as one of the legitimate objects of the police power of the state. "[The police power] is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement

. . . of whatever may be regarded as a public nuisance." *Lawton v. Steele*, 152 US 133, 136 (1894). In the abatement of a nuisance, the Court has held that the Fifth and Fourteenth Amendments recognize no protectable property interest in the instruments used to create the nuisance. "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Goldblatt v. Town of Hempstead*, 369 US 590, 593 (1962), *citing Mugler v. Kansas*, 123 US 623, 668 (1887).

The draft Restatement (2d) being circulated in April 1970, defined a public nuisance as "a criminal interference with a right common to all members of the public." Restatement (2d), Tentative Draft No. 16 (American Law Institute, 1970). The Reporter who authored the Draft concluded after reviewing the cases that "a public nuisance is always a crime." To support his conclusion, he cited the conclusions of numerous text writers who were unanimous on the point. As an example he quoted 1 Wood, Nuisances (3d Ed. 1893), 39: "Every person owes certain duties to the public. * * * Among these duties is that of so using his property as not to injure the public * * * that it is treated as a public offense, and is Punishable by fine or imprisonment."

Costs have never been recognized as a defense to crimes or a lawful exercise of the police power to prevent a significant interference with public health. The law requires no weighing of private economic interests before an injunction would issue to abate such offenses.

Indeed, when Senator Muskie declares in his speech introducing the bill that – "The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons." Leg. Hist., 227 – he sounds much more like a judge in equity applying the law of public nuisance to abate a significant interference with the public health than a graduate school professor offering a theory of public health policy. And when the Senate report explains that "[a]n ambient air quality standard is sufficient to protect the health of such persons whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air," it sounds very much like a test for determining pollution levels that must be reached to prevent a significant interference with public health. Thus to the extent Congress might have had a broader frame of reference than the implementation of the 1967 Act by HEW for its intended meaning of "public health," it was most likely the way the law had used the term for a century or more to define conduct that could be summarily abated under the police power.

Given the total absence of congressional references to textbooks written by professors at graduate schools of public health, it is wholly improbable Congress intended the meaning suggested by petitioners. A broad study of public policy aimed at defining targets for the investment of public and private resources to protect public health, or even a narrower inquiry into the environmental protection programs likely to protect the most lives, as in

Breyer, *Breaking the Vicious Circle*, might well consider the best-bang-for-the-buck in developing public health programs. But by 1970, Congress had obviously advanced well beyond the point of having chosen improved air quality as an appropriate program for protecting the health of the nation. Congress did not assign to EPA responsibility for deciding whether its budget would best be spent on achieving a safe level of air quality. Congress declared unequivocally that its purpose was to "authorize a massive attack on air pollution." S. Rep., 1 (Leg. Hist., 401). To this end, Congress directed EPA to set standards that would ensure "an absence of adverse effect on the health of . . . persons in sensitive groups from exposure to the ambient air." *Id.*, 10. And "determined that existing sources of pollutants either should meet the standard of the law or be closed down. . . . " *Id.*, 3. It directed EPA to set NAAQS requisite to protect the public health, i.e., to protect the public from the diseases of air pollution. It did not delegate to EPA authority to decide whether the costs of controlling emissions might be better spent on some other public health program.

Only Congress may reverse its determination that standards must protect public health without regard to economic consequences. As discussed, *infra*, Congress has provided relief from the economic consequences of strictly applying such standards on numerous occasions, but it has never reversed its decision that standards for protecting public health be based solely on the evidence of harm caused by pollutants in the ambient air.

C. Legislative History Reveals No Expectation That Costs Are a Relevant Factor.

The legislative history of the 1970 Act confirms the conclusions drawn from a straightforward reading of the statutory text. Costs are discussed only as relevant to the control techniques guidance to be provided the States under § 108(b); nowhere else.

The source of legislative intent most relevant to § 109(b) is the Senate committee report because the text of the final bill bears little relationship to the House bill. The House bill would have required promulgation of national standards "for any pollutant or combination of pollutants which . . . endanger or may endanger the public health or welfare," Leg. Hist., 911, but provided no guidance whatsoever regarding the factors relevant to determining the stringency of the standards. Had the House bill become law, it might have been implied that Congress delegated virtually unlimited power to the Administrator to determine relevant factors, including costs. But an Administrator's decision to weigh costs as a factor in justifying standards that fail to protect against adverse health effects would not have resolved the kind of constitutional objections raised by Chief Justice Rehnquist in the *Benzene* case to such an unlimited grant of legislative power.

The law was drawn from the Senate bill which did prescribe a controlling factor for setting standards, to wit, "shall be . . . standards the attainment and maintenance of which are necessary to protect the health of persons." Leg. Hist., 486. The conference committee, reverting back to the language in the 1967 Act, adopted the controlling

phrase "requisite to protect the public health." This language gave direction to the Administrator to set standards at the level needed to protect the public health. Given the common understanding of public health, *supra*, the statutory text provided no authority to consider costs.

The Senate report provided guidance regarding the kinds of populations and the types of evidence Congress considered relevant to setting standards. The report advised that standards need not "provide for the quality of air required to protect those individuals who are otherwise dependent on a controlled internal environment," but emphasized "that included among those persons whose health should be protected . . . are particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment." S. Rep., 10 (Leg. Hist., 410). Thus, if people with serious afflictions are healthy enough to be out in the world, the air should be safe for them to breathe.

Congress also provided guidance regarding the measure of harm that should be used to select the level of the standards.

> Ambient air quality is sufficient to protect the health of such persons whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air. An ambient air quality standard, therefore, should be the maximum permissible ambient air level of an air pollution agent or class of such agents (related to a period of time) which will protect the health of any group of the population. *Id.*

Finally, the report also emphasized that

> In setting such air quality standards the Secretary should consider and incorporate not only the results of research summarized in air quality criteria documents, but also the need for margins of safety. Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified. *Id.*

The margin of safety was added, no doubt, to provide legislative authority for the agency practice described by Commissioner Middleton by which air quality standards "must be lesser than the level at which this thing [effect] was observed. In addition, we say that a margin of safety must be included." Leg. Hist., 1185.

None of the factors Congress identified as relevant to setting NAAQS in the report or elsewhere during the legislative process even suggests that costs are relevant. The primary emphasis is on providing protection against pollution levels for which "the latest scientific knowledge," § 108(a)(2), shows an "adverse effect," and then adding a margin of safety to account for possible effects not yet demonstrated. At a minimum, known or proven effects must be protected against before the Administrator – in the context of setting a margin of safety – may make judgments concerning what degree of protection to add against suspected effects.

In context, the factors discussed in the Senate report are consistent only with the meaning of public health discussed *supra*, that standards are to be set to prevent the diseases of air pollution. Clearly, the concept of

adding a margin of safety is fundamentally at odds with considering factors, such as costs, that might weigh against providing a full measure of protection against levels of pollution that are shown to be associated with the diseases of air pollution. It argues for a construction that uncertainty be weighed in favor of protection, and not setting standards at the margin of adverse effects. Such a policy is not consistent with considering costs.

D. The 1977 Amendments.

The 1977 Amendments affirmed the policies adopted in the 1970 Act including Congress's decision that standards be set solely on the basis of the evidence of harm to health. The strongest evidence supporting this conclusion is that Congress did not amend § 109(b). Other compelling evidence includes the enactment of § 109(d)(1) requiring the periodic review and revision, as appropriate, of both the criteria under § 108 and the standards "in accordance with section 108 and subsection (b) of this section;" and the enactment of a required economic impact statement for enumerated standard setting provisions of the Act, but not including NAAQS.

Taken together, these changes requiring that 1) air quality criteria issued under § 108, but not control techniques information, be reviewed and revised every five years as part of the NAAQS review process; 2) that the review and the need to revise NAAQS be based on the same statutory language as enacted in 1970; and 3) an economic impact assessment be required for some standards but not the NAAQS; demonstrates Congress's re-

affirmation of its 1970 decision not to require consideration of costs as relevant to the NAAQS decision.

1. The New Duty to Review and, As Appropriate, Revise the NAAQS.

ATA attempts to build an entire house of cards out of a single phrase in the CASAC amendment, § 109(d)(2)(C)(iv), which calls upon CASAC to "also . . . advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." In context, that assignment of authority to CASAC must be seen as independent from its responsibilities to advise the Administrator regarding the need for revision of NAAQS.

The CASAC amendment sets out two separate areas of responsibility for the Committee. The first is governed by subparagraph (d)(2)(B), and establishes a statutory schedule for CASAC to "recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria as may be appropriate under section 108 and subsection (b) of this section." CASAC's statutory schedule dovetails with the schedule governing EPA's review and revision of the NAAQS under (d)(1), requiring its recommendations to be provided a year in advance of the Administrator's deadline. Furthermore, CASAC's recommendations are not unconstrained. The Committee is, as is the Administrator, required to base its recommendations on the relevant statutory factors established by § 109(b). The House committee made clear its expectation that under the review and revise amendment,

"[t]he Administrator is required to promulgate new standards and revise existing standards as are appropriate under the terms of section 109(b) of the Act." H. Rep. No. 95-294 (1977), 182. The explicit reference to § 109(b) as the relevant guide for CASAC's recommendations makes clear that Congress did not empower CASAC to consider any factors not relevant to the Administrator's decision to set or revise NAAQS under subsection (b).

Separately, and not related to their recommendations on the revision of NAAQS, § 109(d)(2)(C) also empowers CASAC to offer advice, not recommendations, on other matters. Included among these subjects are various effects which might result from strategies that might be adopted to implement the NAAQS. In contrast to (d)(2)(B) which calls for recommendations expressly tied to the decision under § 109(b) and the schedule for NAAQS review, none of the subject areas of advice invited by Congress under (d)(2)(C) are related to any particular decision to be made by the Administrator. The House committee explained that "this advice may be of interest and assistance to the States and to Congress in fashioning future legislation." H. Rep., 183. It certainly could also be relevant to EPA in the event the Agency found itself promulgating federal implementation plans for States under § 110(c).

ATA's argument that the directive to provide general advice on the economic effects of implementation strategies provides authority for consideration of costs when setting NAAQS is a bootstrap argument that would impermissibly overrule Congress's explicit directive that CASAC's recommendations on NAAQS be addressed solely to factors that are appropriate under § 109(b).

Nothing in the revision requirements of § 109(d) even hint at the possibility that Congress intended to modify its decision in 1970 to base NAAQS solely on evidence of harm to public health.

2. New Requirement for Economic Impact Analysis of Standards.

If Congress had intended in 1977 to add costs to the NAAQS decision, it certainly had a context for doing so when it required economic impact assessments for other standards. But it clearly rejected that option. As finally enacted, § 317, 42 U.S.C. § 7617, requires 1) "the costs of compliance," 2) "potential inflationary or recessionary effects," 3) "effects on competition," 4) "effects . . . on consumer costs," and 5) "effects . . . on energy use" to be considered as part of the development of a standard. But by its terms, the section only applies to the specific standards enumerated in subsection 317(a).

These enumerated provisions of the Act were those for which costs had been explicitly identified as relevant factors in the controlling statutory section, as, for example, new source performance standards under § 111 and new discretionary tailpipe standards under § 202. Section 109(b) was notably missing from the list. Nor was Congress's omission of § 109(b) inadvertent. "Nor is this section intended to alter the statutory basis for rulemaking under any section of the Act. Economic factors referred to in this section may be considered by the Administrator only to the extent allowed by the basic substantive provision." H. Rep., 53.

This explanation of § 317 by the House committee makes clear that Congress intentionally chose to require consideration of costs for some standard setting provisions of the Act and not others; that Congress did not expect costs to be considered under provisions where costs were not mentioned as relevant factors such as § 109(b); and that Congress chose not to revise its 1970 decision to exclude costs from § 109(b).

E. 1990 Amendments.

In 1990, Congress once again did not amend § 109(b). Nor was the duty added by § 109(d) to review and revise in accordance with subsection (b) amended.

The only amendment related to NAAQS was the addition of a requirement for the preparation of periodic economic impact analyses "associated with compliance with each standard issued for – (1) a criteria air pollutant subject to a standard issued under section 109." § 312(a)(1). This provision required a retrospective analysis one year after enactment, and a prospective analysis biennially thereafter. The provision does not direct the Administrator to take the results into account when setting or revising NAAQS. Where Congress did require that the results of the economic impact assessment required by § 317 be taken into account when the affected standards were being adopted, but did not require a similar result here, it can only be concluded that Congress did not intend the information developed for the economic impact analysis required by § 312 to be relevant to the NAAQS decision.

F. Structure of the Act Indicates Congress Intended Costs be Considered When Imposing Control Obligations on Sources, But Not in Setting NAAQS.

The overall structure of the Act shows that Congress chose carefully when costs should be considered and when not. As a general rule, costs are identified as a relevant factor when deciding the degree of emissions reduction to be required of specific sources or source categories. In contrast, costs are excluded from the decision when the health protection targets of the Act are being determined. This scheme is consistent with the intended meaning of "requisite to protect the public health," *supra*.

The degree of emissions control required on existing stationary sources is primarily governed by the requirements for State implementation plans in §§ 110 and 172 of the Act, and controls on major new or modified stationary sources are governed by the new source performance standards adopted nationally for various source categories, and the case-by-case requirements for new construction permits in §§ 165 or 173, depending on whether the source is located in an area designated "nonattainment" or "attainment/unclassifiable" under § 107(d). Emissions standards for motor vehicles are governed by § 202, and other sections of Title II provide for standards on other mobile sources such as aircraft and construction equipment. Standards for motor vehicle fuels are set under § 211. All of these provisions include explicit consideration of costs, except for § 173 which relies upon a technology-based standard for determining the control

requirement for major stationary sources in nonattainment areas. Standards for fuels under § 211 must consider costs if the standards are based on factors related to the performance of motor vehicle engines, § 211(c)(1)(B), (2)(B), but not when the standards are set to protect public health under § 211(c)(1)(A), (2)(A).

The only provision of the Act that requires more emissions reductions than those obtained by taking cost factors into account are the requirements of §§ 110(a)(2) and 172(c) requiring implementation plans to provide for attainment of the NAAQS. In most areas of the country, States can demonstrate attainment by satisfying the "reasonably available control technology" requirement for stationary sources and the "reasonably available control measures" requirement to reduce emissions from vehicle use and other area emissions. § 172(c)(1). Only in the more heavily polluted areas are less cost-effective controls or technology-forcing requirements needed to attain by the statutory deadlines.

But where this scheme has imposed widespread burdens on industries that Congress considers important to the national interest, Congress has not been reluctant to intervene to protect those industries from the consequences of strict implementation of the NAAQS and the statutory deadlines. Four classic examples are 1) the provisions in § 125 establishing a procedure for relieving major fuel burning sources from requirements that might result in shutdown and major economic dislocations; 2) the ten-year waiver allowed by § 119 (1977) for existing nonferrous smelters from the requirement to meet the NAAQS by installing continuous emission control technology; 3) the Steel Industry Compliance Extension Act of

1981, § 113(e) (added 1981, repealed 1990), that allowed large integrated steel plants to stretch out their compliance programs beyond the deadlines established in the 1977 Act, and 4) amended § 202 that granted the extension to 1981 of the original deadline in the 1970 Act for autos to achieve the required 90% reduction in tailpipe emissions by 1975. Congress has also given governors general authority to grant temporary emergency suspensions of SIP requirements. § 110(g).

This statutory scheme, as implemented with occasional interventions by Congress, demonstrates the underlying premise of this argument, i.e., that Congress reserved to itself the option to provide relief when the requirements of health-based standards have proven to impose costs or other burdens that are ultimately deemed politically unacceptable. As Senator Muskie promised in 1970, "[i]f the Congress, which would have made the policy in the first instance, is persuaded that the industry cannot do the job, Congress could change the policy." Leg. Hist., 236. And so in 1977 Congress did change the policy to give industries all across the land more time to meet the standards. But Congress did not change the underlying policy that air quality standards must be set solely on the basis of what is needed to protect public health.

The original scheme, combined with congressional interventions, has served well to promote the effective implementation of the public health protection objectives of the Act without major disruptions to the economy, without triggering massive layoffs and without causing widespread shutdowns among the nation's most polluting industries. There is nothing broken here that requires

fixing. And even if there were, it would be up to Congress to fix it; not a court.

Here the inquiry into legislative intent should end. The relevant indicators of the factors Congress considered relevant to setting NAAQS consistently lead to only one conclusion – Congress required NAAQS to be based exclusively on the latest scientific knowledge of the adverse effects of air pollution on human health. Nothing in the statutory text of the legislative history suggests that costs are relevant to that task. Clearly, Congress rejected the option of delegating to an administrative agency the authority to compromise protection of public health based on considerations of cost, and reserved to itself the exclusive power to make tradeoffs between the protection of the public from the diseases of air pollution and the public and private costs of providing that protection.

II. PROTECTING AGAINST NON-THRESHOLD POLLUTANTS DOES NOT SUPPLY AUTHORITY TO CONSIDER COSTS.

ATA and others suggest that the congressional choice not to allow costs as a relevant factor in setting NAAQS, as evinced by traditional tools of statutory construction, needs to be reconsidered because EPA's 1997 standards address pollutants that are presumed to be non-threshold pollutants. But the legislative history indicates that Congress considered the non-threshold problem. In its directive to adopt standards that "are requisite to protect the public health", "and allow[ ] an adequate margin of safety," Congress directed EPA to regulate to protect

against exposures for which "the latest scientific knowledge" establishes that adverse health effects would occur, and to add a margin of safety to protect against effects that might reasonably be anticipated to occur.

Neither of these statutory directives for standard-setting require EPA to set standards at zero unless scientific evidence demonstrates that adverse effects are proven to occur at any exposure greater than zero. Those are not the facts of this case. There is no compelling scientific evidence of adverse health effects below the range of levels considered by EPA, and the agency has not adopted zero-risk standards. But even if there were evidence of harm at such levels, the answer to the statutory construction question would remain the same – Congress did not authorize the EPA Administrator to decide that some Americans should be allowed to die because the costs of preventing those deaths is too high. But, as Senator Muskie said, Congress will be sitting and can change the policy if the consequences of a standard are unacceptable.

During the Senate hearings, after Commissioner Middleton explained "that a national air quality standard will be one that protects against the minimum adverse health effect," he was asked by Senator Eagleton whether "that is different than known no-effects." In the dialogue that followed, Leg. Hist., 1184-85, Dr. Middleton explained that they were very different.

> Dr. Middleton. To identify a no-known effects level is something that would be, in my opinion, not only extremely difficult but very likely not possible.

> I could not tell you where that level would be, because the knowledge that we have shows there is not any single level where something either begins or stops. There are a series of things taking place. Two things happen: the state of our knowledge is always in flux, improvement, and secondly, it is not that simple a decision, because the causes of destruction of lung tissue, as an example, may be the result of a series of biochemical effects that occurred earlier and that may be difficult to detect. . . .
>
> Senator Muskie. How does that relate to your national ambient air quality standard which you say would be set at the no-health-effects point?
>
> Dr. Middleton. The criteria documents state the level at which effects begin, some measurable things that are observed to take place. The Clean Air Act provides that the standards shall be protective of health, which means they must be lesser than the level at which this thing was observed.
>
> * * *
>
> Senator Muskie. But there is a no-effects area?
>
> Dr. Middleton. We know from the criteria published for sulfur oxides, that at certain levels definite adverse effects occur in the lung. We also know that at a little lower level there are more subtle effects on the action of the lung, and that below that some enzyme system begins to fail or to function improperly.
>
> The no-effect level would have to be somewhere below that. . . .

The central distinction of this dialogue is between a "no-effects" level, which is comparable to a zero risk policy, and an "adverse effects" level. The distinction is reflected in the 1969 "Air Quality Criteria for Sulfur Oxides", where studies were reported that included both changes in bodily functions, *Id.* Chapter 7, and more severe effects characterized as "increased mortality," "increased daily death rate," "increased hospital admissions," "sharp rise in illness rates," "accentuation of [chronic lung disease] symptoms," and "increased severity and frequency of respiratory diseases." These more severe effects, however, were the studies relied upon to judge effects on health. *Id.*, 161-62.

When Congress stated that "[a]mbient air quality is sufficient to protect the health of such persons whenever there is an absence of **adverse effect** on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air," S. Rep., 10, it was obviously adopting the approach followed by NAPCA in issuing its Criteria documents and its approach to approving state-submitted standards. That approach can best be described as the evidence of harm test; something significantly more than merely evidence of a detectable change that has no direct relationship to health status.

The judgment Congress made is that NAAQS should prevent "adverse effects" as demonstrated by "the latest scientific knowledge" required by § 108(a)(2) for the development of the air quality criteria, and that a margin of safety must be allowed so that NAAQS are set below the level at which harm was demonstrated. The determination as to what effects constitute an adverse effect, and how the margin of safety should be determined, was

left to the sound judgment of an expert administrator. That judgment, when exercised, must be based on reasoned decisionmaking and not be arbitrary or capricious. CAA § 307(d)(9).

The nature of the process Congress created is therefore driven by the advances in the scientific understanding of the relationship between air pollution and disease. As the science advances, if adverse effects are detected at lower levels of exposure, the Act requires the standards to be revised. But it only demands a response to evidence of adverse effect, not suspected or predicted effects. Beyond that, the Act also delegates to the Administrator discretion to consider suspected or predicted effects in setting the margin of safety. But the margin of safety does not require EPA to set "zero" as the standard, or even allow her to set a "zero" standard unless there is a credible basis for the Administrator to conclude that such a standard is "requisite to protect the public health."

III. Who Wins, Who Loses?

The objective of the Act is to ensure there will be no victims of the diseases of air pollution. EPA estimates that its fine particle standards alone will prevent 15,000 deaths per year in the U.S. PMJA 3486-87. In 1990, Congress cited evidence that annually "50,000 premature deaths may be caused by air pollutants. . . . " S. Rep. No. 101-228 (1989), 3. The total death toll from air pollution in general, or fine particles in particular, is not, by any reliable estimate, an insignificant public health problem. Eliminating death by air pollution is possible, someday, only if the standards that animate the control programs

under the Act are set at levels that will prevent those deaths.

If that goal is compromised by standards that fail to require that level of protection, there will be many losers. Most obvious are the victims of the pollution itself – those thousands who suffer premature death, or the tens of thousands who require frequent hospitalization and medical attention, or the hundreds of thousands who need to bear the burden of the expense and physical side effects of increased medication, and the millions of Americans forced to stay home from school, or work or the sand lot baseball diamond on a summer afternoon. Among these victims are the individuals filing this brief who are virtually incapacitated on high pollution days.

These losses by the victims of pollution can be monetized for analysis purposes, but in human terms these are losses that cannot be fully compensated with money. Nor is there any mechanism routinely to compensate the victims for these losses. The reality is that if not prevented, most of those losses will never be compensated.

If the NAAQS are not based on the latest scientific evidence of harmful levels of air pollution, then there may be numerous other losers as well. First will be the States that have responsibility for issuing most new source permits under the Act. Federal law requires only that permit applicants demonstrate that their emissions will meet the NAAQS. *E.g., see* § 165(a). But many State air statutes and most State's common law prohibit emissions that injure, harm or endanger public health. If there is a substantial body of evidence that harm will occur at levels allowed by the NAAQS, then State agencies will

become the battleground for determining the necessary limits on emissions to protect public health. The result will be a return to the days of conflict over each new source permit on public health grounds. Permit applicants will have no assurance that they can get a permit by simply demonstrating compliance with the NAAQS, permitting agencies will have to develop expertise in various fields related to the science of health effects, and communities will have no assurance that their air will be safe to breathe if the NAAQS are met. This approach will also produce multiple conflicting determinations of the amount of pollution exposure that can be allowed and still protect the public health.

Such challenges are already being brought based on the evidence of harm from short-term SO2 exposures that convinced the D.C. Circuit to remand the SO2 NAAQS to EPA, *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), and the evidence that the fine particle NAAQS is not adequate to protect against most of the mortality and morbidity effects of high daily exposures that is the basis for CBT's challenge in this case. In Pittsburgh, citizens challenged a permit for a new coke plant proposed by LTV on the ground that SO2 and fine particle emissions meeting both NAAQS would cause significant harm to the public health, and in Arizona the City of Tempe raised similar issues in a demand that EPA quantify the residual risks of exposure to fine particles that would not be prevented by the 1997 NAAQS as part of the NEPA review of a new power plant. In Washington State, the parents of an asthmatic 10-year-old boy and a 7-year-old girl with cystic fibrosis are suing the State under the Americans With Disabilities Act for the failure to adopt

emissions controls to prevent life-threatening levels of fine particle pollution from wheat stubble burning that nonetheless meet EPA's 24-hour NAAQS for PM2.5. *Save Our Summers v. Washington State Department of Ecology*, No. CS-99-0269-RHW (E.D. Wa.). If EPA is allowed to set NAAQS that fail to protect against scientifically demonstrated adverse effects because of costs, or otherwise fail to meet the standard of the law, then these kinds of challenges to new and existing sources will likely become commonplace nationwide.

There is a significant benefit for all stakeholders, including the industry petitioners in this case, that flows from the confidence of the public that if the NAAQS are met their air will be safe, and the certainty for industry and the permitting agencies that flows from one national standard that ensures the public is protected from the known adverse effects of air pollution. These benefits are some of the objectives Congress had in mind when it replaced the process for setting many regional standards with one national standard that protects the public health with an adequate margin of safety.

CONCLUSION

The decision of the Court of Appeals in *Lead Industries Ass'n v. EPA*, and subsequent cases, holding that costs play no part in setting NAAQS, should be affirmed.

Respectfully submitted,

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No. 99-1426

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.*,*

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors other than health effects relating to pollutants in the air, given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

PARTIES TO THE PROCEEDINGS

Cross-Petitioners are: American Trucking Associations, Inc., Chamber of Commerce of the United States, National Coalition of Petroleum Retailers, Burns Motor Freight, Inc., Garner Trucking, Inc., Genie Trucking Line, Inc., National Automobile Dealers Association, National Association of Manufacturers, National Small Business United, The American Portland Cement Alliance, The Glouster Company, Inc., Non-Ferrous Founders' Society, Equipment Manufacturers Institute, American Farm Bureau Federation, and American Road and Transportation Builders Association.

None of these cross-petitioners has any parent corporations, and no publicly traded company owns 10 percent or more of any of these cross-petitioners' stock.

Respondents are: Carol M. Browner, the Administrator of the Environmental Protection Agency, and the Environmental Protection Agency.

The following additional entities participated as parties in the court of appeals: Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association), American Chemistry Council (formerly Chemical Manufacturers Association), American Forest and Paper Association, American Iron and Steel Institute, American Lung Association, American Petroleum Association, American Public Power Association, Appalachian Power Company, Atlantic City Electric Company, Baltimore Gas and Electric Company, James Bassage, Carolina Power & Light Company, Centerior Energy Corporation, Central and South West Services, Inc., Central Hudson Gas & Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, Central Power & Light Company, CINergy Corporation, Citizens for Balanced Transportation, Cleveland Electric Company, Columbus Southern Power Company, ComEd Company, Consumers Energy Company, Dayton

Power & Light Company, Delmarva Power & Light Company, The Detroit Edison Company, Duke Energy Company, Duquesne Light Company, Edison Electric Institute, FirstEnergy Corporation, Florida Power Corporation, Michael Gregory, Idaho Mining Association, Illinois Power Company, Indiana Michigan Power Company, Indianapolis Power & Light Company, Jacksonville Electric Authority, Kansas City Power & Light Company, Judy's Bakery, Kennecott Energy and Coal Company, Kennecott Corporation, Kennecott Services Company, Kentucky Power Company, Kentucy Utilities Company, Louisville Gas and Electric Company, Madison Gas and Electric Company, Commonwealth of Massachusetts, David Matusow, Brain McCarthy, Meridian Gold Company, The State of Michigan, Midwest Ozone Group, Minnesota Power, Monongahela Power Company, National Association of Home Builders, National Indian Business Association, National Mining Association, National Paint and Coatings Association, National Petrochemical & Refiners Association, National Rural Electric Cooperative Association, National Stone Association, Nevada Mining Association, The State of New Jersey, Newmont Gold Company, Northern Indiana Public Service Company, Oglethorpe Power Corporation, The State of Ohio, Ohio Edison Company, Ohio Power Company, Ohio Valley Electric Corporation, Oklahoma Gas & Electric Company, PacificCorp, Plains Electric Generation & Transmission Cooperative, Inc., Phoenix Cement Company, The Potomac Edison Company, Potomac Electric Power Company, PP&L Resources, Public Service Company of New Mexico, Richard Romero, Salt River Project Agricultural Improvement & Power District, Small Business Survival Committee, South Carolina Electric & Gas Company, Southern Company, Tampa Electric Company, Toledo Edison Company, Union Electric Company, United Mine Workers of America, AFL-CIO, Virginia Power, Western Fuels Association, West Penn Power Company, The State of West

Virginia, West Virginia Chamber of Commerce, and Wisconsin Electric Power Company.

The following participated as *amici curiae* in the court of appeals: Representative Tom Bliley, Senator Orrin G. Hatch, Connecticut, New Hampshire, New York, and Vermont.

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INTRODUCTION

Two decades ago, the D.C. Circuit ruled in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148, 1153-54 (D.C. Cir. 1980), that the Environmental Protection Agency ("EPA" or "the Agency") must ignore all factors "other than health effects relating to pollutants in the air" in setting National Ambient Air Quality Standards ("NAAQS"). Pet. App. 15a (internal quotation omitted). That decision was wrong when decided and remains wrong to this day. The text of Clean Air Act ("CAA" or "Act") section 109(b)(1), a host of surrounding statutory provisions, and the Act's overall purposes all belie the notion that Congress intended to prohibit EPA from weighing *all* relevant factors in setting air-quality standards. Now, the same erroneous *Lead Industries* interpretation threatens to do more harm than good by apparently sanctioning new ozone ("O_3") and particulate matter ("PM") standards that EPA must concede (ozone) or that quite possibly (PM) have costs that outweigh their predicted health benefits.

The court below invalidated both of EPA's standards on constitutional nondelegation grounds, but only because it believed *Lead Industries* precluded EPA from setting standards based on a commonsense weighing of benefits and costs. Under *Lead Industries*, that decision was surely correct. But this Court need not reach constitutional nondelegation issues at all if it rejects *Lead Industries* and interprets the Act as contemplating the weighing of various pros and cons, including the supposed "non-health" factors presently embargoed under *Lead Industries*. Besides being supported by the statutory text, that outcome will further Congress' aim of protecting "public health" and promote reasoned EPA decisionmaking, while also facilitating effective Executive Branch and Congressional oversight of EPA's NAAQS under Executive Order 12,866 and recently-enacted statutory provisions.

OPINIONS AND ORDERS BELOW

The final EPA rules on review are reported at 62 Fed. Reg. 38,652 and 62 Fed. Reg. 38,856. The opinion of the court of appeals (Appendix to the Government's Petition ("Pet. App.") 1a-69a) is reported at 175 F.3d 1027. The opinions on the petitions for rehearing (Pet. App. 70a-101a) are reported at 195 F.3d 4.

EPA's rules and Regulatory Impact Statement have been lodged with the clerk. The other record materials cited herein may be found in the D.C. Circuit joint appendices for the ozone and PM cases ("OJA" and "PMJA," respectively).

JURISDICTION

The court of appeals entered its judgment on May 14, 1999. On October 29, 1999, timely petitions for panel rehearing were granted in part and denied in part, with suggestions for *en banc* rehearing denied in their entirety. The Government's petition for *certiorari* was timely filed on January 28, 2000, and the conditional cross-petition was timely filed on February 28, 2000. Supreme Court Rule 12.5 and 28 U.S.C. § 1254(1) provide the basis for jurisdiction.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutory and regulatory provisions are central to this case: the Clean Air Act, the Unfunded Mandates Reform Act, and Executive Order 12,866, relevant portions of which are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

A. The Clean Air Act

This case requires the Court to construe for the first time Clean Air Act section 109, the core provision of the Nation's air pollution control program. CAA § 109, 42 U.S.C. § 7409. Under section 109, EPA must set National Ambient Air Quality Standards for the "criteria" pollutants listed under section

108(a)(1) of the Act, 42 U.S.C. § 7408(a)(1). Once EPA sets a NAAQS for a pollutant, the Act's Title I requires that all States enforce that NAAQS against the stationary emission sources within their borders. *See* CAA §§ 110, 171 *et seq.*, 42 U.S.C. §§ 7410, 7501 *et seq*. In addition, the NAAQS levels set by EPA heavily influence the setting of mobile source emission standards by EPA (and certain States) consistent with the Act's Title II. *See* CAA § 201 *et seq.*, 42 U.S.C. § 7521 *et seq*. These stationary sources include essentially all businesses, large and small, plus facilities operated by federal, State, and local governments. Mobile sources include, not just cars, trucks, trains, and airplanes, but also smaller emission sources, including boats, snowmobiles, and even lawn mowers. The NAAQS levels chosen by EPA, more so than any other federal regulatory decisions, pervasively impact the Nation's economy.

NAAQS are formulated by a lengthy process consisting of a series of discrete steps. EPA first develops an "air quality" "criteria document" for "each air pollutant . . . emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and which "results from numerous and diverse mobile or stationary sources." CAA § 108(a), 42 U.S.C. § 7408(a). After these criteria documents are reviewed by a scientific advisory committee established by section 109(d) of the Act, known as the Clean Air Scientific Advisory Committee or "CASAC," EPA proposes primary and secondary NAAQS, and these also are reviewed by CASAC. *See* CAA § 109(d), 42 U.S.C. § 7409(d). The primary NAAQS established by EPA must be set at levels "requisite to protect the *public health*" with "an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1) (emphasis added). The secondary NAAQS must be set at levels "requisite to protect the *public welfare*." CAA § 109(b)(2), 42 U.S.C. § 7409(b)(2) (emphasis added).

Following promulgation of a NAAQS, EPA designates every geographic area in the nation (known as an "air quality

control region") as "attainment," "nonattainment," or "unclassifiable." CAA § 107(d), 42 U.S.C. § 7407(d). Each nonattainment area is then "classified" based on "factors such as the severity of nonattainment in such area and the availability and feasibility of . . . pollution control measures" for the area, and then, based on that classification, it is assigned an attainment date. *See* CAA § 172(a)(1, 2), 42 U.S.C. § 7502(a)(1, 2) ("Subpart 1"). Primary responsibility for meeting the attainment deadlines falls to the States, through the adoption and enforcement of State Implementation Plans ("SIPs"). *See* CAA § 110(a), 42 U.S.C. § 7410(a). Additionally, the 1990 amendments to the Act establish a specific plan directed at reducing ozone levels nationwide and eventually solving the intractable nonattainment problems for that pollutant that have persisted since the setting of the first NAAQS in 1971. Under that statutory plan, each ozone nonattainment area is assigned a classification based on the extent of its noncompliance with the ozone air-quality standards set by EPA in 1979, as well as a specific attainment date based on those classifications. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) ("Subpart 2").

B. The 1996 Rulemakings

In the early 1990s, EPA initiated proceedings to reconsider the NAAQS for ozone, originally set in 1971 and revised in 1979, and PM, originally set in 1971 and revised in 1987.

1. The Ozone Rulemaking

Ground-level ozone, often called smog, is formed through the reaction of volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx") in the air, with the highest concentrations usually occurring during sunny, hot summer days. *See* 62 Fed. Reg. 38,856, 38,858 (July 18, 1997). Ozone levels are enhanced by human activity, but ozone also occurs naturally since both NOx (a product of burning) and VOCs (compounds emitted by vegetation) are present in nature.

According to EPA, peak background (*i.e.*, natural) levels of ozone generally range from 0.3 to 0.5 parts per million ("ppm"), and vary from region to region. *See* OJA 1830 (EPA's Ozone Staff Paper).

Elevated ozone levels are associated with various respiratory problems (ranging from discomfort to severe respiratory constriction) that can compound asthma and other lung ailments. EPA first addressed ozone in 1971 when it set a one-hour photochemical oxidant NAAQS at a level of 0.08 ppm, not to be exceeded more than once annually in each air quality control region. *See* 36 Fed. Reg. 8,186 (Apr. 30, 1971). While technically covering a broader category of compounds, compliance with the photochemical oxidant standard was judged by measuring ozone alone. States were required to meet this standard by 1975, but as of 1977, most regions of the country were far from compliance. *See* National Research Council, RETHINKING THE OZONE PROBLEM IN URBAN & REGIONAL AIR POLLUTION 4 (1991) ("RETHINKING OZONE"). In 1979, EPA partially responded by reevaluating the health evidence on which the original standard had been based and revising the maximum one-hour reading (now renamed the ozone NAAQS) upward to 0.12 ppm. *See* 44 Fed. Reg. 8,202 (Feb. 8, 1979). Congress also extended the deadline for compliance until 1982 for most areas, and until 1987 for areas not expected to be able to meet the 1982 deadline. *See* RETHINKING OZONE at 4. Ozone levels declined significantly after 1979, but most large metropolitan areas were still not in NAAQS compliance by 1990. *See* OJA 1823 (Ozone Staff Paper); RETHINKING OZONE at 4; Pet. App. 32a. Accordingly, Congress in the 1990 Amendments established the current Subpart 2 attainment schedule, which sets varying compliance deadlines, extending to 2010. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1); Pet. App. 32a.

In 1992, EPA began its periodic, five-year review of the ozone NAAQS by updating the section 108 ozone air quality

criteria ("the Criteria Document"). *See* 57 Fed. Reg. 38,832 (Aug. 27, 1992). Once review of that document was completed, EPA staff prepared an "Assessment of Scientific and Technical Information" (the "Ozone Staff Paper") that synthesized the Criteria Document's technical information and made recommendations to the Administrator. *See* OJA 1790-2293. The Ozone Staff Paper recognized that most ozone health effects are transient and reversible, and that there is "only limited, suggestive evidence" that "[a]n increase in daily mortality [is] associated with O_3 exposure." *Id.* at 1870. Specifically, while "[s]everal efforts have been made to find associations between long-term O_3 exposure and chronic respiratory dysfunction and disease," these "associations between O_3 exposure and chronic health impacts have not been sufficiently demonstrated in humans." *Id.* at 1871; *see also id.* at 1870. The Staff Paper suggested adoption of a revised ozone NAAQS between a 0.07 and a 0.09 ppm daily maximum eight-hour ozone level, based on three-year averages of somewhere between the second- to the fifth-highest annual ozone concentration. *See id.* at 1974-77. (As the Staff explained, a 0.09 ppm level averaged over eight hours is roughly equivalent to the current 0.12 ppm level averaged over one hour. *See* 62 Fed. Reg. at 38,856, 38,858.) In so doing, the Paper predicted that the Administrator's selection among these broad options would require a "policy judgment," since exposure to ozone presents "a continuum of risk," as opposed to a threshold below which adverse health effects cease to occur. OJA 1971-72, 1976.

CASAC reviewed both the Criteria Document and the Staff Paper. CASAC agreed that, because "ozone may elicit a continuum of biological responses down to background concentrations," "the paradigm of selecting a standard at the lowest-observeable-effect level and then providing an 'adequate margin of safety' is no longer possible." OJA 237. Moreover, this "continuum" is such that "there is no 'bright line' which distinguishes any of the proposed standards (either

the level or the number of allowable exceedances) as being significantly more protective of health." *Id.* at 238. "For example, the differences in the percent of outdoor children . . . responding between the present standard and the most stringent proposal . . . are small and their ranges overlap for all health endpoints." *Id.* CASAC accordingly was reluctant to recommend any specific standard to the Administrator. *See id.* Acknowledging that the issue is not scientific, several CASAC members went on to express what they termed "'personal' preferences," with four favoring a standard of at least 0.09 ppm, three favoring 0.08 ppm, and one favoring a range of 0.08-0.09 ppm. *See id.*

In announcing the final standard, the Administrator stated both that "it is likely that O_3 may elicit a continuum of biological responses down to background concentrations" and that "a zero-risk standard is neither possible nor required by the Act." 62 Fed. Reg. at 38,863. She agreed that "there is no break point or bright line that differentiates between acceptable and unacceptable risks," but chose a 0.08 ppm standard over a 0.09 ppm standard because "[t]he general population as well as children and asthmatics would breathe cleaner air as a direct result of . . . the proposed standard." *Id.* at 38,864, 38,868. The Administrator "recognize[d]," however, that there was merit to "the views of those who argue that similarly large improvements in public health protection would result from a standard set at 0.07 ppm as compared to the proposed standard, such that, based on the same reasoning, the evidence warrants a standard set at 0.07 ppm." *Id.*

The Administrator offered three reasons for not going that far. *First*, no CASAC member had expressed a "'personal' preference" for a 0.07 ppm standard. *See* 62 Fed. Reg. at 38,868. *Second*, "[t]he most certain O_3-related effects . . . are transient and reversible (particularly at O_3 exposures below 0.08 ppm), and the more serious effects . . . are less certain." *Id.* *Third*, the Agency noted that "a 0.07 ppm level would be

closer to peak background levels." *Id.* In her Response to Comments document, the Administrator stated that peak background levels vary from region to region, and are generally in the range of 0.03 to 0.05 ppm. *See* OJA 173-77.

Rulemaking commenters argued that selection of any NAAQS level would be arbitrary without consideration of the costs of achieving compliance. The Administrator rejected this point, saying that the Agency and the D.C. Circuit had previously "interpreted section 109 of the Act as precluding consideration of the economic costs or technical feasibility of implementing NAAQS in setting them." 62 Fed. Reg. at 38,878. As for constraints on her discretion, the Administrator asserted that she was free to select any standard within the proposed range, and that her decision was "largely judgmental in nature" and need follow "no generalized paradigm"; nor need she even decide "what risk is 'acceptable'" through quantification "or any other metric." *Id.* at 38,883. As for whether she needed to follow a consistent standard-setting approach or provide a definite meaning to key statutory terms, the Administrator said that she "is not limited to any single approach to determining the margin of safety and may, in her judgment, choose a two-step approach, or perhaps some other approach, depending on the particular circumstances confronting her in a given NAAQS review." *Id.*

One thing the Administrator did not (and could not) say was that compliance costs and similar data were unavailable to illuminate the consequences of her decision. EPA endeavored in this case, as it had over the years, to keep cost data and other types of countervailing evidence—specifically, all evidence other than medical data showing adverse health consequences of pollution—out of the criteria development and CASAC review process. For instance, EPA refused to permit CASAC to review scientific literature showing that ground-level ozone, like stratospheric ozone, has beneficial effects in shielding the public from harmful ultra-violet radiation. *See, e.g.*, OJA 255-

71, 2666, 2676, 2759, 2849, 3089. The United States Department of Energy ("DOE"), attempting to impress the significance of these studies on CASAC, testified that revising the ozone NAAQS in the range proposed by the EPA Staff Paper would produce an estimated 2,000-11,000 additional cases of skin cancer per year, 130-260 additional cases of melanoma (including 25-30 deaths per year), plus 28,000 additional cataract cases annually. *Id.* at 255-71. DOE stressed that these detrimental health effects are "at least as well established as the relationship between ozone concentrations and lung disease." *Id.* at 257. A study by Office of Management and Budget staff members similarly concluded that the "adverse health effects of . . . EPA's more stringent NAAQS may be similar in magnitude to the respiratory-related beneficial effects of such an O_3 reduction." *Id.* at 2759, 2764; *see also id.* at 3089. CASAC members expressed interest in this issue, and EPA conceded that DOE's concern "could be big." *Id.* at 267. Nevertheless, EPA concluded that these data were legally beyond the bounds of consideration. *See id.* at 210.

Similarly, CASAC was forbidden by the Administrator from considering the data on compliance costs assembled in response to Executive Order 12,866 (President Clinton). Those data, prepared by EPA's economic consultants, estimated that the costs of bringing all areas of the country into compliance with the revised ozone NAAQS by 2010 would be $9.6 billion per year. By comparison, EPA predicted that the benefits would range from $1.5 billion to $8.5 billion annually. Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule (July 16, 1997) ("RIA") at ES-11, ES-17. The RIA estimated that an interim step—"partial attainment"—would cost $1.1 billion annually, with benefits in the range of $0.4 to $2.1 billion per year. *Id.* at ES-12, ES-17.

The difference between the high and low ends of EPA's benefits ranges is accounted for almost entirely by benefits that the RIA said could arise from preventing certain cases of "premature mortality." *See* RIA at ES-17 ("Mortality benefits represent about 90% of the high end benefit estimates."). But the CASAC-reviewed Staff Paper found no persuasive evidence of any such mortality effects. *See supra*, at 6. To resolve this inconsistency, the RIA cited subsequent studies, not analyzed in the Staff Paper or reviewed by CASAC, which were said to "document a possible relationship between ozone and premature mortality." RIA at 12-15. In the parallel PM rulemaking, however, EPA stated it could *not* rely on such unreviewed studies, "based on its long-standing practice of basing NAAQS decisions on studies and related information included in the pertinent air quality criteria and available for CASAC review." 62 Fed. Reg. at 38,862. In any event, EPA ultimately acknowledged "substantial uncertainty" on this point. *Id.* Once these mortality-reduction benefits and certain PM-related benefits are excluded, *see* RIA 12-15, EPA's estimate of the costs of full compliance exceeds its benefits estimates six times over ($9.6 compared to $1.5 billion). *See, e.g.*, ES-11, ES-17.

EPA's cost estimates changed substantially between the draft and final RIAs. EPA derived final cost estimates by assuming that all reasonably available control technologies with an annual cost per ton of emissions reductions of $10,000 or less would be used. *See* RIA at 7-7. The Agency further determined that attainment of the revised ozone NAAQS would require a 2,529 ton reduction in daily NOx emissions, and a 3,455 ton reduction in daily VOC emissions. *See id.* at 7-10. The Agency next estimated that the nation could achieve 22-24 percent of this NOx reduction target and 37-43 percent of the EPA VOC reduction target with technologies that satisfy the $10,000 cost cap, and deemed these reductions "partial attainment." *See id.* at 7-9. When the Agency then estimated the cost of full compliance, it again assumed that attainment

costs for the remainder of the required reductions (comprising the bulk of all required reductions) also would not exceed $10,000 per ton—even though all identifiable technologies costing less than that amount were already accounted for in the "partial attainment" figure. *See id.* at 9-5.

Because there is no empirical basis for EPA's $ 10,000 per ton cost cutoff, EPA conceded that it "has much less confidence in these cost estimates" than it does in its partial attainment estimates. RIA at ES-12. That caveat is seconded by a recent study asserting that EPA's full-attainment cost estimates assume an "implausibly high rate of technological progress." Randall Lutter, *Is EPA's Ozone Standard Feasible?*, Joint Center for Regulatory Studies at 7 (December 1999) (emphasis added); *see also* Darrell A. Winner & Glen R. Cass, *Effect of Emissions Control on the Long-Term Frequency Distribution of Regional Ozone Concentrations*, 34 Environ. Sci. & Technol. 2612, 2617 (June 15, 2000). While the effect of EPA's $10,000 cost cutoff was not apparent until the final RIA, the President's Council of Economic Advisors reached a comparable conclusion when it projected that EPA's ozone NAAQS would cost between $11.6 billion and $60 billion, compared to benefits of $200 million to $1 billion. *See* Memorandum from Alicia Munnell, CEA, to Art Frass, OMB, dated 12/13/96 ("CEA Memo") (cited in Stephen Huebner & Kenneth Chilton, *EPA's Case for New Ozone & Particulate Standards: Would Americans Get Their Money's Worth?*, Center for the Study of American Business Policy Study 27 (1997) ("*Huebner & Chilton*").

2. The PM Rulemaking

Unlike ozone, particulate matter is not a single substance. PM is instead the "generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes." 62 Fed. Reg. 38,652, 38,653 (July 18, 1997). These particles originate from both manmade and natural sources and may be either

emitted directly or formed in the atmosphere through transformations of gaseous emissions, including VOCs, NOx, and sulfur oxides ("SOx"). *Id.* The particles vary in size, a fact that EPA deems important both because particles' size "determines their behavior in the respiratory system," and because it determines their "atmospheric lifetime," which is "a key consideration in assessing health effects information because of its relationship to exposure." PMJA 1914 (PM Staff Paper). EPA has explained that "[t]he chemical and physical properties of PM vary greatly with time, region, meteorology, and source category, thus complicating the assessment of health and welfare effects." 62 Fed. Reg. at 38,653.

EPA has believed for years that, taken as a whole, PM is associated with respiratory and cardiovascular problems, including premature mortality. *See* 62 Fed. Reg. at 38,656. The initial PM NAAQS, issued in 1971, targeted airborne particles up to 45 micrometers in size, particles commonly referred to as total suspended particulate, or TSP. *See* 36 Fed. Reg. 8186 (Feb. 8, 1971); PMJA 1909 (Staff Paper). In 1987, EPA changed the "indicator" of PM from TSP to PM_{10}, which encompasses particles with a mean aerometric diameter less than or equal to 10 μm.

The rulemaking that produced the PM standards in this case occurred "under a highly-accelerated, court-ordered schedule," 62 Fed. Reg. at 38,654 & n.3 (citing *ALA v. Browner*, CIV-93-643 (D. Ariz. Oct. 6, 1994)), that had EPA struggling to complete both its PM Criteria Document and its PM Staff Paper. Echoing the Criteria Document, the PM Staff Paper stated that it is "important to emphasize the unusually large uncertainties associated with establishing standards for PM relative to other single component pollutants for which NAAQS have been set." PMJA 2153. The Staff Paper went on to explain that "[w]hile severe effects at the high concentrations of air pollution in the historical episodes are widely accepted as being causally related, there is less consensus as to the most

appropriate interpretation of studies finding associations of health effects with ambient levels of PM below the current NAAQS." *Id.* at 1993. Moreover, "[t]he majority of the evidence concerning health effects of PM exposure comes from epidemiological studies," which measure statistical correlation but not necessarily causation. *Id.* The Staff Paper found this point significant because "it has proven to be difficult to separate individual effects of multiple pollutants" in certain PM studies, raising the possibility that observed correlations might be due to "confounding" factors, not PM. *Id.* at 2002-03.

Further complicating matters, the Staff Paper explained that "available . . . information yields no demonstrated biological mechanism(s) that can explain the associations between ambient PM exposure and mortality and morbidity. . . . Thus, any discussion of possible mechanisms linking ambient PM exposures to mortality and morbidity effects is necessarily limited to hypotheses derived from animal or human studies conducted at exposure levels of PM constituents far higher than found in ambient air." PMJA 1952. The Staff Paper thus concluded that "there is an urgent need to expand ongoing research on the mechanisms by which PM . . . may cause adverse health effects." *Id.* at 1959.

The most serious of the health effects noted by the Staff Paper is a "small but significant increas[e] in mortality and morbidity in some sensitive populations at concentrations below the levels of the current ambient standards for PM." PMJA 2019. However, "it is reasonable to expect that some of the mortality associated with short-term pollution is occurring in the weakest individuals who might have died within days even without PM exposure." *Id.* at 1972. The Staff Paper thus cautioned that "it is not possible to confidently estimate quantitatively" the extent to which lives are actually shortened. *Id.* at 1974. Here again, the Paper recommended that "[m]ore research is needed." *Id.* at 2156.

The Staff Paper recommended establishing separate standards for fine and coarse PM. Fine PM consists of particles measuring between approximately 0 and 3 μm in diameter; coarse PM consist of particles between approximately 1 and 10 μm. PMJA 2127. The Paper acknowledged that "the epidemiological data providing a direct comparison of the health effects of fine and coarse particles are quite limited in comparison to that of PM_{10} (which contains both coarse and fine mode fractions)." *Id.* at 2020. It speculated nonetheless that fine particles "are a better surrogate for that fraction of ambient PM that is most clearly associated with the health effects observed in community air pollution studies at levels below the current standards." *Id.* at 2049. It also asserted that fine particles are potentially more dangerous to public health because they penetrate deeper into the respiratory system. *See, e.g., id.* at 1914.

As with ozone, the PM Staff Paper declined to recommend specific standards, saying instead that the ultimate choice of a PM standard is a "policy" decision. PMJA 2136. PM presents a "continuum of exposures," such that "attempting to identify 'lowest observed effects levels' and adding margins of safety below such levels is not an appropriate approach in this case." *Id.* at 2134-35. Moreover, "[r]elative to other single pollutants for which NAAQS have been set, establishing appropriate ranges of levels for $PM_{2.5}$ [fine PM] standards involves unusually large uncertainties." *Id.* at 2135. In considering this "continuum," the PM Staff Paper (like the Ozone Staff Paper) did not take into account any offsetting health or non-health factors. *See id.* at 2134-25.

After reviewing the Criteria Document and Staff Report, CASAC recommended that EPA retain the current PM_{10} NAAQS and establish a $PM_{2.5}$ NAAQS. PMJA 3162. But it reached "no consensus on the level, averaging time, or form of a $PM_{2.5}$ NAAQS." *Id.* CASAC instead provided the Agency with a table setting forth the disparate views of its members.

CASAC's cover letter stated that the table "appears to defy further characterization," but "[p]art of this diversity of opinion can be attributed to the accelerated review schedule" ordered by the Arizona district court. *Id.* at 3163. CASAC, like EPA's Staff Paper, stressed that "[t]he Agency must immediately implement a targeted research program to address . . . unanswered questions and uncertainties," in order "to avoid being in a similar situation when the next PM NAAQS review cycle is under way." *Id.* at 3163-64; *see also id.* at 3142-43.

According to the table transmitted by CASAC, only two of the 21 panelists endorsed an annual $PM_{2.5}$ standard as low as the 15 $\mu g/m^3$ standard ultimately adopted by EPA, while eight of the 21 opposed establishing an annual $PM_{2.5}$ standard at all. PMJA 3165. The majority of members opposing the low $PM_{2.5}$ standard chosen by EPA "were influenced, to varying degrees, by the many unanswered questions and uncertainties regarding the issue of causality." *Id.* at 3163. CASAC was especially critical of epidemiological studies, since that evidence "is not unambiguous" given that "[t]he risk factors being reported are not large and they have relatively large uncertainties." *Id.* at 3140. CASAC also emphasized that "[i]t is of paramount importance to know whether some, most, or all of the deaths are advanced by only one or several days." *Id.* at 3141.

EPA's final rule acknowledged the great "uncertainty in the characterization of health effects attributable to exposure to ambient PM." 62 Fed. Reg. at 38,655. Based primarily on epidemiological studies, however, the Administrator determined that the existing PM NAAQS was insufficient from a public health standpoint. *See, e.g., id.* at 38,655. The Administrator agreed that there is no known causal mechanism whereby PM levels below the existing NAAQS could harm public health. *See id.* at 38,656. She also acknowledged that the health effects at issue might be caused by only certain types of particles, not PM generally. *See id.* at 38,667. Despite these "significant uncertainties," she determined that there is an

"adequate basis for regulatory decision making at this time." *Id.* at 38,655.

The Administrator recognized in selecting a fine PM standard that, as with ozone, she faced both uncertainties and "a continuum of effects associated with exposures to varying levels of PM." 62 Fed. Reg. at 38,673. In response to comments that the selection of any level along that continuum would be arbitrary unless balanced against countervailing considerations, the Administrator again asserted her prerogative to promulgate revised NAAQS using *ad hoc* analysis that recognizes "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." *Id.* at 38,688.

The Administrator's most basic choice was her decision to regulate PM based on particle size rather than chemical composition. She explained that "the available evidence is not sufficient to *exclude* nitrates or any other class of fine particles." 62 Fed. Reg. at 38,667 & n.26 (emphasis added). In contrast, she set different standards for small ("fine") and large ("coarse") particles, despite agreeing that the evidence on this point was also not entirely satisfactory, as relatively few studies have addressed fine PM, as opposed to PM generally. *See id.* at 38,665; *see also Huebner & Chilton* at 11-12 (only 7 of the 27 studies identified in Staff Paper actually address $PM_{2.5}$); Draft Memorandum from Rosina Bierbaum, OSTP, to Sally Katzen, OIRA (President's Office of Science and Technology Policy determines that "[t]he database for actual levels of $PM_{2.5}$ is . . . very poor;" "only a handful of studies have actually studied $PM_{2.5}$ per se," and "current data do not support clear associations of PM effects with . . . fine particles") (as quoted in Dana C. Joel, *Surprising Critics of the New Clean Air Standards: The U.S. Government*, Citizens for a Sound Economy Foundation Issue Analysis (Apr. 9, 1997) ("*Surprising Critics of the New Clean Air Standards*"). The

selection of $PM_{2.5}$ as the fine PM indicator was thus made "largely [as] a policy judgment." 62 Fed. Reg. at 38,665.

The Administrator's selection of a coarse particle indicator was also a subject of considerable discussion. Here, the Administrator retained the current PM_{10} measure, rather than accepting the "views of several CASAC panel members" who "suggested" replacing it with a $PM_{10-2.5}$ indicator—an indicator that measures only coarse particles and excludes fine ones. 62 Fed. Reg. at 38,668. She defended that selection by asserting that "the only studies of clear quantitative relevance to effects most likely associated with *coarse* fraction particles have used *undifferentiated* PM_{10}," and making the pragmatic observation that a "large" "monitoring network" is "already in place for PM_{10}." *Id.* (emphasis added).

Having chosen to regulate both fine and coarse PM and set the indicators for both, the Administrator proceeded to set actual standards. She determined that she would not adjust the levels of the current annual and 24-hour PM_{10} standards "[g]iven the uncertainties in the available scientific evidence." 62 Fed. Reg. at 38,678. As for fine PM, she decided to promulgate an annual standard to control emissions generally, and a supplementary 24-hour standard to protect against high peak concentrations and seasonal emissions, explaining that this would be the most "efficient approach." *See id.* at 38,570.

Whereas "uncertainties" in the "scientific evidence," 62 Fed. Reg. at 38,678, had prompted her to leave in place the current PM_{10} standards, the Administrator decided with respect to an annual fine PM standard that she would regulate, "*despite* well recognized uncertainties," down to levels "somewhat *below* where the body of epidemiological evidence is *most* consistent and coherent." *Id.* at 38,675 (emphasis added). In her view, "the strength of the evidence of effects increases for concentrations that are at or above the long term (*e.g.*, annual) mean levels reported for [certain] studies." *Id.* at 38,676. Studies reported in the Criteria Document had found mean

concentrations to "range from about 11 $\mu g/m^3$ to 30 $\mu g/m^3$." *Id.* After reciting these results, the Administrator concluded that "[t]aken together, and placing greatest weight on those studies that were clearly statistically significant, this evidence suggests that an annual standard level of 15 $\mu g/m^3$ is appropriate." *Id.* The Administrator did not dispute that this level is "*below* the range of annual data *most strongly* associated with both short- and long-term exposure effects." *Id.* (emphasis added). Nor did she rely on peak background levels or transiency and irreversibility of health effects, as she had in choosing an ozone NAAQS. *See id.*

The Administrator then concluded that, having enacted such a strict annual fine PM standard, there was "no need to consider levels in the lower portion" of the range suggested for the 24-hour fine PM standard. 62 Fed. Reg. at 38,677. "Further," she said that "the risk associated with peak 24-hour exposures in otherwise clean areas is not well enough understood at this time to provide a basis for selecting the more restrictive levels in the range of 50 to 65 $\mu g/m^3$." *Id.* Based on these rationales, she chose a 65 $\mu g/m^3$ level. *See id.* She did not discuss either the levels at which the evidence is "most strongly associated" with exposure effects, nor the mean concentrations from studies, as she had in choosing an annual $PM_{2.5}$ NAAQS. *See id.*

As with the ozone NAAQS, the Administrator also did not consider predicted compliance costs or any other non-medical information bearing on the consequences of her action. *See* 62 Fed. Reg. at 38,683; PMJA 312, 319 (EPA's Response to Comments). EPA acknowledged, however, that full attainment with its revised PM NAAQS by 2010 would cost at least $37 billion annually, making this standard the most expensive environmental program ever. Even "partial attainment," as defined by EPA, would cost $8.6 billion. *See* RIA at ES-12, 13. In contrast, the Agency estimated the benefits of full attainment to range from $20 to $110 billion, and those of

partial attainment to range from $19 to $104 billion. *See id.* at 12-1.

As with ozone, the difference between the high and low-end benefits estimates consists primarily in how mortality benefits are estimated and valued. *See, e.g.*, RIA at 12-44. The RIA calculated the high end estimates by valuing every avoided premature mortality at $4.8 million. *See id.* at 12-15, 16, 41. The RIA made an alternative estimate, however, in response to criticisms that estimating benefits from PM reductions should be based on "not only how many premature deaths are avoided, but . . . how long these deaths are postponed." *Id.* at 12-16. That alternative, reflected in EPA's low-end estimates, assigned a set value to every "statistical life-year extended." On that assumption, the fine PM standards' predicted benefits are significantly less than their predicted costs. *See id.*

The PM cost calculations are also similar to the ozone calculations in that they impose a $10,000 cost cap for "partial attainment," then assume that full attainment can be reached with measures that do not exceed this cap. *See* RIA at 6-16, 9-7. The President's Council of Economic Advisors determined that EPA's analysis "understates the true costs . . . by orders of magnitude." CEA Memorandum (as quoted in *Surprising Critics of the New Clean Air Standards* at 1).

C. The Congressional Response

Congress responded to EPA's final rules by postponing implementation of the revised ozone and PM standards, thus providing time for pre-implementation judicial review. *See* Pub. L. No. 105-178, §§ 6101-03, 112 Stat. 465 (1998). Specifically, Congress codified an Executive Order, issued the same day as the final ozone and PM rules, that delayed the implementation of the PM NAAQS until at least 2005. *See id.* § 6102; 62 Fed. Reg. 38,421, 38,427-28 (July 18, 1997). Congress also pushed back implementation of the ozone NAAQS by one year. *See* Pub. L. No. 105-178, § 6103(a).

And Congress emphasized that "[n]othing" in its action "shall be construed . . . to be a ratification of the ozone or [PM] standards." *Id.* § 6104.

D. The Court of Appeals Proceedings

1. Panel Proceedings

Before the D.C. Circuit, EPA continued to assert that it is barred from considering non-health factors including compliance costs in setting NAAQS, and that it is even barred from considering the protective health effects of ground-level ozone. *See, e.g.*, EPA Ozone Br. at 43. Based on *Lead Industries*, the D.C. Circuit agreed with the Agency's refusal to consider compliance costs. "Our cases read § 109(b)(1) as barring EPA from considering any factor other than 'health effects relating to pollutants in the air.'" Pet. App. 15a (citing, *inter alia*, *Lead Industries*, 647 F.2d at 1148). The D.C. Circuit emphasized that its "*Lead Industries* decision was made in *Chevron* step one terms," and held that *Lead Industries* unambiguously "precludes" EPA from considering costs. *See id.* at 19a.

The D.C. Circuit disagreed, however, with EPA's claim that "nothing in the statute requires [the Administrator] to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." EPA Ozone Br. at 43 (emphasis added). Instead, the court held that section 109 must be construed to provide some "intelligible principle" that guides the exercise of agency discretion. *See* Pet. App. 5a. The court found that EPA's construction of the Act fails this test by not "speak[ing] to the issue of degree." *Id.* at 7a. It then illustrated the point by using the Agency's justification for choosing a 0.08 ppm level for ozone. *See id.* at 8a-11a. The court explained that, while EPA claims to have chosen 0.08 ppm over 0.09 ppm "because more people are exposed to more serious effects at 0.09 than at 0.08," it "never contradict[ed] the intuitive proposition, confirmed by data in its Staff Paper, that reducing the [0.08]

standard to [0.07] would bring about comparable changes." *Id.* at 8a. EPA responded that "a 0.07 standard would be 'closer to peak background levels,'" but "a 0.08 level, of course, is also *closer* to these peak levels than 0.09." *Id.* at 9a (emphasis in original).

The court discounted the Administrator's reliance on individual CASAC members on the ground that they merely stated their "personal" preferences—preferences that provided no reasoned basis for preferring a 0.08 ppm or 0.09 ppm level to a 0.07 ppm level. *See* Pet. App. 8a. As the court put it:

> EPA's explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm. Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety . . . ."

Id. at 7a.

The court found the same flaws in EPA's attempts to justify its PM NAAQS. EPA defended those standards "on the basis that there is greater uncertainty that health effects exist at lower levels than the level of the standard." Pet. App. 10a. But the court responded that "the increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much. None does." *Id.* The court accordingly "remand[ed] the cases for EPA to develop a construction of the act that satisfies" the nondelegation doctrine and, "if appropriate, modify the disputed NAAQS in accordance with that construction." *Id.* at 4a-5a.

The D.C. Circuit emphasized that, although some form of cost-benefit or similar analysis could ordinarily serve as the

necessary "intelligible principle," such an approach "is not available" because of *Lead Industries*. Pet. App. 15a (internal quotation omitted). The court suggested one alternative construction for the Agency to consider, a principled "criterion of probability" analysis based on a "generic unit of harm that takes into account population affected, severity and probability." *Id.* at 16a. The court acknowledged, however, that since "EPA may not consider cost," it may have to "conclud[e] that there is no principle available" that would be constitutionally sufficient. *Id.* at 18a. Judge Tatel dissented from the court's nondelegation analysis. *See id.* at 59a.

In contrast, the court unanimously reversed EPA's refusal to consider the potential health protective effects of ground-level ozone, labeling "bizarre" the Agency's contention "that a statute intended to improve human health would . . . lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance." Pet. App. 47a. As for particulate matter, the court also unanimously reversed the Agency's use of PM_{10} as an indicator for coarse PM. The court explained that, having determined that coarse and fine particles should be regulated separately, EPA acted arbitrarily and capriciously by using an indicator for coarse particles that includes fine particles. *See id.* at 49a-53a. The court further noted that EPA's reliance on a "pragmatic" basis for this decision—specifically, the fact that a monitoring program for PM_{10} already exists—is contrary to EPA's own position that it may not consider pragmatic factors in setting NAAQS. *See id.* at 52a-53a.

Finally, the court of appeals addressed Subpart 2 of the Act, which establishes a specific schedule for reducing ozone levels nationwide. *See supra*, at 4, 5. The court accepted EPA's contention that, notwithstanding the detailed provisions of Subpart 2, the Agency may still revise the ozone NAAQS. *See* Pet. App. 31a-43a. In doing so, however, the court unanimously rejected EPA's contention that "Subpart 2

specifically provides classifications and attainment dates only for nonattainment designations under the [existing] ozone NAAQS." *Id.* at 37a. The text and drafting history of this provision confirm that it applies to all ozone NAAQS, including revised NAAQS. *See id.* at 38a-39a. Because Congress' handiwork was "purposeful and not the drafting error that EPA's interpretation implies," "EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." *Id.* at 34a, 39a.

2. Rehearing Proceedings

In response to EPA's rehearing petition, the panel underscored that, because EPA's statutory interpretation lacked an "intelligible principle," remand to the agency was the appropriate remedy: "[J]ust as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority." Pet. App. 76a (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984)). The panel also dismissed EPA's continuing contention that it should not be required to consider its standards' detrimental health effects, noting that the Agency's further arguments do not "warrant consideration in a published opinion." *Id.* at 82a.

The panel also unanimously rejected EPA's new argument that it lacked jurisdiction to reach the Subpart 2 issue because the Agency "has taken no final action implementing the revised NAAQS." Pet. App. 77a, 79a. The court explained that EPA's promulgation of the revised NAAQS "triggered" certain statutory provisions that "impose a number of requirements upon the states." *Id.* at 78a.

The panel also rejected EPA's reiterated contention that Subpart 2 amounts to a scrivener's error. *See* Pet. App. 79a. The panel noted that "all five Subparts of the Clean Air Act

providing requirements for nonattainment areas" contain the same language. *Id.* The panel then clarified that its holding merely meant that a revised ozone NAAQS "can be enforced only in conformity with Subpart 2," not necessarily that such a NAAQS "cannot be enforced" at all. *Id.* at 81a. Judge Tatel concurred, noting that this would "leav[e] open the possibility" that Subpart 2 applies only until an area attains the existing ozone NAAQS, such that "in areas that have attained the ozone standard, nothing precludes enforcement of the new standard" outside of the Subpart 2 framework. *Id.* at 88a, 89a. The *en banc* court unanimously denied rehearing on this issue.

Two opinions dissenting from the denial of rehearing *en banc* addressed the main statutory interpretation questions. *See* Pet. App. 92a. Judge Silberman's dissent disagreed with the panel majority's use of the nondelegation doctrine, but emphasized that he was "quite uncertain" whether EPA's analysis satisfied the demands of the "arbitrary and capricious standard." *Id.* at 95a-96a. Judge Tatel, joined by Chief Judge Edwards and Judge Garland, also dissented from denial of rehearing because he disagreed with the panel's use of the non-delegation canon. *See id.* at 97a.

E. The Grant of the Petition and Cross-Petition

The Government petitioned for *certiorari* on the nondelegation and Subpart 2 issues, and ATA cross-petitioned to challenge the court of appeals' holding that EPA must "ignore all factors 'other than health effects relating to pollutants in the air'" in setting NAAQS. Cross-Pet. (i). ATA argued that the cross-petition should be granted because reversing the D.C. Circuit on this point would permit the Court to "avoid[] the constitutional nondelegation issue on which EPA focuses." *Id.* at 1. This Court granted both petitions, and set a briefing schedule. *See* 120 S. Ct. 2193 (2000); 120 S. Ct. 2003 (2000).

SUMMARY OF THE ARGUMENT

The court of appeals recognized the trilemma logically entailed by the *Lead Industries* interpretation: *either* (1) the Act must direct EPA to set a zero-level NAAQS for non-threshold pollutants like ozone and PM; *or* (2) EPA must be empowered to select arbitrarily some level above zero for these pollutants (the selection necessarily being arbitrary because any forthright consideration of medical factors alone would likely produce zero standards); *or else* (3) *Lead Industries* must have been wrongly decided.

What the D.C. Circuit did not say expressly was that it is entirely unreasonable to assume Congress would have delegated the authority presupposed by options (1) and (2). If Congress ever intended the "zero risk" standards of option (1)—which, the court of appeals noted, would require "de-industrialization" or worse, Pet. App. 15a n.4—then surely Congress, and not EPA, would be required to make that policy choice explicitly. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646, 675 (1980) (opinions of the plurality and Rehnquist J., concurring) ("*Benzene*"). Likewise, the second option, arbitrary selection of some level above zero, runs afoul of this Court's decisions requiring agencies "to apply *some* limiting standard" in the exercise of delegated authority. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386-90 (1999) (emphasis in original). Finally, options (1) and (2) alike presuppose that Congress might delegate to EPA, the courts, or both, extraordinary authority and discretion over decisions of great "economic and political significance"—a further presumption that cannot be squared with this Court's precedents. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance . . . in so cryptic a fashion."). *See* Part I, *infra*.

Logically, then, the third option—that *Lead Industries* was wrongly decided—must be the case and, in fact, *is* the case under any straightforward interpretation of the Act. *First*, primary NAAQS are set at levels "requisite to protect the public health" "with an adequate margin of safety." Because "public health" is left undefined, that term must be given its "ordinary" and "natural" meaning. By 1970, when section 109(b) was enacted, public health had already taken the meaning given it by public health professionals whose job is to improve health through a synthesis of the medical and social sciences, including economics. Tellingly, the critical role that costs play within this public health tradition is directly at odds with *Lead Industries'* absolute bar on considering such factors in setting NAAQS. *See* Part II.A, *infra*.

Second, provisions surrounding section 109(b) give further testimony to the important role countervailing factors should play in NAAQS rulemakings. Specifically, the information on which NAAQS are to be "based" is not limited to the section 108(a)(2) Criteria Document (which itself should properly include non-medical information), but also includes CASAC's findings, recommendations, and comments, as well as comments and data from the public. Section 108(b) accordingly requires EPA to develop data on control costs *simultaneously* with preparation of the Criteria Document and well in time to be used in the relevant NAAQS rulemaking. Likewise, section 109(d) requires, *inter alia*, that CASAC "advise the Administrator of any adverse public health, welfare, *social, economic or energy effects* which may result from" EPA's proposed NAAQS. *See* Part II.B, *infra*. *Finally*, as the record here demonstrates, EPA simply cannot achieve the Act's statutorily-codified purpose of "public health" protection—or even avoid doing more harm than good—without taking countervailing factors into account. *See* Part II.C, *infra*.

One last option requires exploration. Perhaps, notwithstanding *Lead Industries*, EPA often does consider

countervailing factors such as compliance costs in setting NAAQS—albeit covertly and beyond public view. In fact, the scholarly literature establishes that economic analyses played significant, behind-the-scenes roles in setting both the 1979 ozone NAAQS and the 1987 PM NAAQS. The Administrator's repeated invocations of her wide, discretionary powers of "judgment" therefore might be meant as hints that such analyses played similar roles here. Such disguised decisionmaking would underscore the conflict between EPA's professed interpretation of section 109 and its practice under analogous Clean Air Act provisions, where, notwithstanding *Lead Industries*, the Agency has openly and successfully claimed authority to consider economic factors. *See* Part III.A, *infra*. Even more important, however, such concealed decisionmaking would (1) undermine Presidential oversight under the cost-and-benefit-assessment provisions of Executive Order 12,866; (2) defeat similar requirements of the Unfunded Mandates Reform Act of 1995; and (3) subvert the foundational premises of judicial review on traditional rationality grounds. *See* Part III.B, *infra*. For all of the above reasons, *Lead Industries* should be rejected by the Court.

ARGUMENT

As noted in our *certiorari* briefing, the D.C. Circuit has treated *Lead Industries* as a precedential leper—diseased but untouchable—ever since it re-endorsed it in fashioning a consensus interpretation of another Clean Air Act provision in *NRDC v. EPA*, 824 F.2d 1146, 1154-58 (D.C. Cir. 1987) (*en banc*) ("*Vinyl Chloride*"). *Lead Industries* itself directly addressed and rejected only arguments that an "economic and technological feasibility" test must be used in establishing "margins of safety" under section 109, and that the Agency must show "clear" health effects before regulating. *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148, 1153-54 (D.C. Cir. 1980). But the D.C. Circuit has since read *Lead Industries* to preclude consideration of *all* factors of "cost," *American Petroleum Inst.*

v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981), and even indirect *health* effects such as "health risks from unemployment" caused by a more stringent NAAQS. *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *vacated in part*, 921 F.2d 326 (D.C. Cir.), *cert. dismissed sub nom. Alabama Power Co. v. NRDC*, 498 U.S. 1075 (1991). This line of cases has become so extreme that the panel below brushed aside without comment arguments that the Agency erred by ignoring *health* effects resulting from disruption of the States' ongoing air-quality improvement efforts. *See* OJA 223; PMJA 319. "*Lead Industries*," as used below and elsewhere, has thus become a shorthand for the D.C. Circuit's extreme insistence that all countervailing factors (excepting only a pollutant's direct health benefits) are "non-health" factors and therefore barred from EPA's consideration in setting NAAQS.

I. THIS COURT'S DECISIONS NEGATE THE PREMISES ON WHICH *LEAD INDUSTRIES* IS PREDICATED.

No statute, and certainly not the Clean Air Act provisions at issue here, can be interpreted in a contextual vacuum. To be sure, "[t]he task of resolving the dispute over the meaning of" statutes must begin "with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). But "as [this Court] ha[s] repeatedly stated, the meaning of statutory language, plain or not, depends on context." *Holloway v. United States*, 526 U.S. 1, 7 (1999) (internal quotation and citations omitted); *see also, e.g., Schenck v. Pro-Choice Network*, 519 U.S. 357, 395 (1997) (opinion of Breyer, J.) ("Words take on meaning from context."). The requirements for NAAQS standard-setting, therefore, must be decided within "the broader context of [the statute]," including the nature of the problem Congress sought to solve. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997).

The court of appeals set out the context here in detail. To begin with, "EPA regards ozone definitely, and PM likely, as

nonthreshold pollutants, *i.e.*, ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." Pet. App. 5a. Accordingly, "the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero." *Id.* at 6a. EPA thus recognizes "that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm." *Id.* at 7a. But that truism does not mean "that keeping pollution at or below any particular level is 'requisite' or not requisite to 'protect the public health' with an 'adequate margin of safety.'" *Id.*

Logically, this context forces EPA to pursue just one of three regulatory options. *First*, "EPA could make its criterion the eradication of any hint of direct health risk"—an approach that "would require the agency to set the permissible levels of both pollutants here at zero." Pet. App. 15a. "A zero-risk policy might seem to imply de-industrialization, but in fact even that seems inadequate to the task (and even if the calculus is confined to direct risks from pollutants, as opposed to risks from the concomitant poverty)." *Id.* at 15a n.4. As EPA's Staff Paper and a World Bank report show, "PM (at least) results from almost all combustion, so only total prohibition of fire or universal application of some heretofore unknown control technology would reduce manmade emissions to zero." *Id.*

Second, EPA could select a non-zero standard without considering the factors that might counsel in favor of or against a more or less stringent NAAQS. But the difficulty with this option is that any such selection must, of necessity, be made arbitrarily. In these very rulemakings, "the agency rightly recognizes that the question is one of degree," but nonetheless "offers no intelligible principle by which to identify a stopping point." Pet. App. 11a. Indeed, EPA all but admits to having made arbitrary choices by repeatedly asserting that it was free to follow an *ad hoc* standard-setting approach that recognizes

"no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." 62 Fed. Reg. at 38,864, 38,683, 38,688.

Finally, "cost-benefit analysis, mentioned in [*International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991) ("*Lockout/Tagout I*")]," would provide a third alternative for NAAQS standard-setting but for the fact that it is precluded by *Lead Industries*. Pet. App. 14a-15a. The court of appeals' citation makes clear that, as used below, "cost-benefit analysis" means "only a systematic weighing of the pros and cons." *Lockout/Tagout I*, 938 F.2d at 1321; *accord* Stephen G. Breyer, *et al.*, *Administrative Law & Regulatory Policy* 181 (4th ed. 1999) ("cost-benefit criteria would be understood in a less technical and more commonsensical way, as an invitation to balancing a range of variables"). This concept is broad enough to include properly performed analyses under "significant risk" and similar rubrics. *Cf. Benzene*, 448 U.S. at 641-42 (plurality opinion). Indeed, the court below suggested that EPA might develop an intelligible principle based on one such approach —"a generic unit of harm," reflecting "Quality-Adjusted Life Years." *Id.* at 16a-18a. But the court recognized that even that approach might well be precluded by *Lead Industries*. *See id.* at 18a.

Only the third of these options—a systematic weighing of pros and cons based upon rejection of *Lead Industries* —can be squared with this Court's precedents. As an initial matter, the option of a zero-risk policy is expressly disclaimed by even EPA, *see* Pet. App. 15a; *supra* at 7, and, in any event, could not be adopted without the clearest possible evidence of congressional intent. As this Court has noted, it is generally "unreasonable to assume that Congress intended to give [an agency] the unprecedented power over American industry" to "impose enormous costs that might produce little, if any,

benefit." *Benzene*, 448 U.S. at 645 (plurality opinion); *see also id.* at 675-76 (opinion of Rehnquist, J.). Needless to say, there is no such evidence of intent here.

The second option, non-zero standards set by decisionmakers blinded to all countervailing factors, is similarly precluded by this Court's decisions. As *Iowa Utilities* holds, all congressional delegations "require" the agency "to apply *some* limiting standard, *rationally* related to the goals of the Act." *Iowa Utilities*, 525 U.S. at 388 (first emphasis in original). The need for such limiting principles is especially compelling where, as here, the entire economy is to be regulated. *See Fahey v. Mallone*, 332 U.S. 245, 250 (1947) (holding that delegations confering power over "unprecedented economic problems of varied industries" must be more precise than those regarding "a single type of enterprise"); *Clinton v. New York*, 524 U.S. 417, 487 (1998) (Breyer J, concurring). Because selection of *any* non-zero NAAQS cannot be made "rationally" without a weighing of pros and cons, *see Iowa Utilities*, 525 U.S. at 388, any non-zero NAAQS established under *Lead Industries* will necessarily be arbitrary.

Both zero-risk and arbitrarily-set standards also suffer from a further flaw under this Court's decisions. *Lead Industries* must mean either (as the D.C. Circuit says) that Congress itself barred EPA from considering countervailing factors—an implausible proposition for the reasons summarized below, *see* Part II—or else that Congress delegated to EPA the discretion to ignore all "non-health" factors in setting NAAQS. This Court traditionally "hesitates," however, "before concluding that Congress has intended such an implicit delegation." *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1296, 1314 (2000). Indeed, "[i]t is highly unlikely that Congress would leave" choices of such magnitude to an administrative agency. *MCI v. AT&T*, 512 U.S. 218, 231 (1994). Thus, "[t]he implausibility of Congress's leaving a highly significant issue unaddressed . . . is assuredly one of the factors to be considered

in determining whether there is ambiguity." *Christensen v. Harris County*, 120 S. Ct. 1655, 1664 n.1 (2000) (Scalia J., concurring); *accord id.* at 1667 (Breyer, J., dissenting) (*Chevron* deference inapplicable "where one has doubt that Congress actually intended to delegate interpretative authority to the agency.")

This Court's decisions alone are therefore enough to prove that *Lead Industries* was wrongly decided—unless, perhaps, the statutory text were so absolutely clear as to lead inescapably to the conclusion that Congress deliberately precluded EPA from considering all supposedly "non-health" factors in setting NAAQS. But just the opposite is the case. Far from compelling the *Lead Industries* reading, the statutory text of section 109(b)(1), the surrounding statutory provisions and the Act's public health purpose all show that Congress contemplated that EPA *would* weigh such factors in the standard-setting balance.

II. THE ACT'S TEXT, STRUCTURE AND PURPOSE SHOW THAT EPA MUST CONSIDER NON-HEALTH FACTORS IN SETTING NAAQS.

The D.C. Circuit has most authoritatively stated its rationale for *Lead Industries* as follows: "ambient air standards set under section 109(b) must be based on 'air quality criteria,' which section 108 defines as comprising several elements, all related to health," thereby excluding "non-health" factors. *Vinyl Chloride*, 824 F.2d at 1157-59. That rationale is demonstrably wrong. *First*, the key text of section 109(b) was added in 1970 to direct that EPA protect "public health," a term of art that traditionally signals the consideration of both medical and economic factors. *See* Part II.A, *infra*. *Second*, surrounding statutory provisions in sections 108(a), 108(b) and 109(d) all confirm that what the D.C. Circuit implies are "non-health" factors, including compliance costs, are to be considered in setting NAAQS. *See* Part II.B, *infra*. *Finally*, the Act's purposes, as stated in section 101(b), further reinforce the

role that these factors must play in standard-setting. *See* Part II.C, *infra*.

A. Section 109(b)(1)'s "Public Health" Focus Necessarily Entails Consideration of Non-Health Factors.

The Act's core standard-setting provision, section 109(b)(1), reads as follows:

> National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.

42 U.S.C. § 7409(b)(1). The aim of this provision is manifestly to protect "public health," but precisely what is meant by those two words (or other key terms like "adequate" or "requisite" or "margin of safety") is nowhere defined. We do know that section 109(b) was added by Congress in 1970 to replace a previous State/federal enforcement mechanism that provided that pollution that "endangers the health or welfare *of any persons* shall be subject to abatement." *See* Pub. L. No. 90-148 § 108(a) (emphasis added). It is therefore logical to presume that Congress intended to shift the focus away from pollution that endangers "any person" and toward a broader concept of "public health."

With no definition in the statute itself, "public health" must be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). "Public health" was, of course, a well-established profession in 1970. The discipline then, as now, is practiced through a synthesis of medical and social sciences, with a significant emphasis on economics. As the shift away from the language referring to the "health" of "any person" and toward the aggregate expression "public health" implies, the 1970 Congress must

have expected EPA to set standards by acting like public health professionals, engaged in the traditional practice of their combined medical and social science discipline.

The authoritative public health definition available to the 1970 Congress appeared in C.E.A. Winslow's THE COST OF SICKNESS AND THE PRICE OF HEALTH, published in 1951 as a study for the World Health Organization on the comparative costs and effectiveness of various measures for controlling tuberculosis. That study defines "public health" as follows:

> Public health is the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency [by various means including] the development of social machinery which *will ensure* to every individual in the community *a standard of living* adequate to the maintenance of health.

Id. at 28 (emphasis added). As is evident from the title and contents of Winslow's seminal work, costs provide an important counter-balance in the practice of "public health," as Winslow understood the term. In particular, costs are integral in choosing the "social machinery" for providing specific forms and levels of health protection and in determining the effect which specific measures will have on the population's "standard of living." *See id.* Indeed, Winslow himself exemplifies the use of cost data for these purposes by discussing the relative economic merits of preventative versus curative strategies. *See id.* at 28-29.

It is therefore significant that Winslow's public health definition is cited to this day in leading technical dictionaries. *See* Andrew Porteous, DICTIONARY OF ENVIRONMENTAL SCIENCE AND TECHNOLOGY 445 (2d ed. 1996) ("The basic definition of public health has been given by C.E.A. Winslow, THE COST OF SICKNESS AND THE PRICE OF HEALTH; *accord* Committee for the Study of the Future of Public Health, Division of Health Care Services, Institute of Medicine, THE

FUTURE OF PUBLIC HEALTH 39 (1988) (calling Winslow's definition "[o]ne of the earliest deliberate efforts to define public health's mission [and] still one of the most frequently cited"). Moreover, Winslow's concept of public health as considering costs through the synthesis of the medical and social sciences remains influential not just in works of reference, but also in the scholarly literature.[1]

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[1] *See* David R. Holtgrave *et al.*, *Human Immunodeficiency Virus Counseling, Testing, Referral, and Partner Notification Services, A Cost-Benefit Analysis*, 153 Arch. Intern. Med. (1993); Peter D. Jacobson, *et al.*, *Litigation and Public-Health Policy Making: The Case of Tobacco Control*, 24 J. Health Pol. Pol'y & L. 769, 800 (1999) ("In any given public health issue, the balance will vary depending on the nature and extent of the abridgment of individual liberties, the nature and costs of the public health intervention, the alternatives to governmental intervention, the voluntariness of the activity, and the extent of harm to third persons in the absence of governmental activity."); George C. Cunningham, *A Public Health Perspective on the Control of Predictive Screening for Breast Cancer*, 7 Health Matrix: J. of L.-Med. 31, 36 (1997) (breast cancer screenings must be cost-beneficial and cost-effective); Michael J. Malinkowski, *Globalization of Biotechnology and the Public Health Challenges Accompanying It*, 60 Alb. L. Rev. 119, 163 (1996) ("The myriad of biotechnology capabilities now reaching commerce cannot be made sufficiently available to maximize improvements to public health without cost-benefit analysis."); *Sustainable Redevelopment of Brownfields: Using Institutional Controls to Protect Public Health*, 29 E.L.R. 10243 (1999) ("Among the issues relevant to the effectiveness of institutional controls are how long the risk is expected to remain, how many people may be exposed, potential exposure pathways, whether children may be exposed, how the population may change during the life of the risk, the cost of implementing the control, and the health and safety consequences of exposure."); Lawrence O. Gostin, *et al.*, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 Colum. L. Rev. 59, 128 (1999) ("Public health law reform should promote public health goals by mandating cost-effective alternatives"); Wendy E. Parmett, *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 Hous. L. Rev. 1663, 1687 & n.147 (1999) ("classic model of public health law" considers a form of cost-benefit analysis); Lawrence O. Gostin & Zita Lazzarini, *Prevention of HIV/AIDS*

(continued...)

Although it is surely impossible to elicit a single formulation of what it means to "protect public health," there can be no doubt that the phrase has long connoted a sensitivity to comparative costs and benefits. Indeed, it may be possible to generalize from the academic literature that "[p]ublic health interventions should be based on the degree of risk, *the cost and efficacy of the response*, and the burden on human rights." Lawrence O. Gostin & James G. Hodge, Jr., *The Public Health Improvement Process in Alaska: Toward a Model Public Health Law*, 17 Alaska L. Rev. 77, 83 (2000) (emphasis added). But whatever precise formulation of the role of costs and similar considerations is chosen, the fact remains that the practice of modern "public health" means that these factors, at a minimum, must be considered. Indeed, this Court itself recently recognized in a different context that Congress could not have intended health concerns to exclude all consideration of cost, since the determination what degree of "risk" is "unacceptabl[e]" necessarily "depend[s] on a judgment about the appropriate level of expenditure for health care in light of the associated . . . risk." *Pegram v. Herdrich*, 120 S. Ct. 2143, 2150 (2000). There is accordingly no way to reconcile the "ordinary and natural" meaning of "public health," *see Meyer*, 510 U.S. at 476, with *Lead Industries*' absolute bar on the consideration of such factors.

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[1] (...continued)
Among Injection Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention, 46 Emory L.J. 587 (1997) ("the public health perspectiv[e] . . . readily lends itself to a consequentialist analysis," specifically, "weighing the benefits, costs, and harms generated by each approach, to determine which yields the greatest aggregate value").

B. The Supporting Provisions in Sections 108(a), 108(b) and 109(d) Confirm that Non-Health Factors, Including Compliance Costs, Are to Be Considered in Setting NAAQS.

The *Lead Industries* line of cases has never focused on the meaning of public health as outlined above. Those precedents seek instead to tease out a definition, not directly, but by negative implication from the fact that section 109(b)(1) directs that NAAQS be promulgated "based on such criteria," presumably meaning the criteria document described in section 108(a)(2). Section 108(a)(2) requires EPA to develop:

> Air quality criteria for an air pollutant [that] shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of *all identifiable effects on public health or welfare* which may be expected from the presence of such pollutant in the ambient air, in varying quantities.

CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2) (emphasis added). The provision then sets forth, in its subparagraphs (A), (B), and (C), three specific types of material that a criteria document "*shall* include" "to the extent practicable": (A) "variable factors" which may alter the effects of the pollutant on "public heath or welfare;" (B) other "air pollutants" that "may interact" with the pollutant under study in the atmosphere "to produce an adverse effect on public health or welfare;" and (C) "any known or anticipated adverse effects on welfare." *Id.*

As an initial matter, Subparagraph (C) by its terms apparently contemplates that the criteria documents should go beyond public health (however defined) and include information on "any known or anticipated adverse effects on public welfare." "Welfare" is then defined by the Act to mean effects on "soils, water, crops vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property . . . as well as effects on *economic*

values and on personal comfort and well-being." CAA § 302(h), 42 U.S.C. § 7602(h) (emphasis added). Under any straightforward reading of these texts, the criteria document must therefore *include* information on "adverse" effects on "economic values and personal comfort"—concepts that surely are broad enough to encompass non-health factors such as compliance costs. Of course, such data are essential for setting "secondary" NAAQS under section 109(b)(2). But nothing in either section 108 or section 109 limits the use of cost and similar data to the setting of "secondary" standards, or excludes such information from consideration in setting "primary" standards, such as those at issue here.

The D.C. Circuit has never addressed the text of section 108(a)(2)(C) except obliquely and in dictum. *See Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1117-18 (D.C. Cir. 1979) ("*MEMA*"). The D.C. Circuit's *MEMA* dictum suggests, however, that criteria documents need only assess those "welfare effects" attributable to airborne pollution itself, not welfare effects that attend NAAQS compliance. *See id.* at 1118 ("The terms 'public health and welfare' . . . encompass economic values, but only to reflect the economic costs of pollution, not the social costs of pollution control."). But that reading is contradicted by the immediately preceding text of section 108(a)(2), which says that "[a]ir quality criteria for an air pollutant shall accurately reflect . . . *all* identifiable effects on public health *or welfare* which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2) (emphasis added). This broad directive to assess "*all* identifiable effects" on "welfare" attributable to "the presence of such pollutant in the ambient air" is, of course, precisely the meaning which the *MEMA* court would give to the entirely separate statement in section 108(a)(2)(C). The *MEMA* dictum thus violates the "cardinal principle of statutory construction" that statutes must be read so as "to give effect, if possible, to

every clause and word of a statute." *Bennett v. Spear*, 520 U.S. 154, 173 (1997).

The D.C. Circuit also has assumed that section 108(a)(2) "outlines *the criteria*"—that is, the *exclusive* criteria—"on which air quality standards are to be based." *Vinyl Chloride*, 824 F.2d at 1159 (quoting *Lead Industries*, 647 F.2d at 1149 n.37) (emphasis added). But the text of section 109(b)(1) does not compel this reading and other provisions of sections 108 and 109 positively refute it. *First*, the D.C. Circuit's interpretation fails to read "criteria" in conjunction with the rest of the Act. Outside of the Clean Air Act, "criteria" can and often do refer to standards on which "a decision may be based." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 307 (9th ed. 1987). As used in section 108, however, "criteria" refers not to decisional standards, but to the compilations of information that the Act requires EPA to use in NAAQS standard-setting. EPA itself refers to each such compilation in capital letters as a "Criteria *Document*." *See, e.g.*, 62 Fed Reg. at 38,654 (PM rule); 62 Fed. Reg. at 38,857 (Ozone rule).

Second, a Criteria Document does not remotely establish the *exclusive* compendium of decisional information necessary for NAAQS standard-setting. The Act directs EPA to set standards "based on" criteria documents; it does *not* require that standards be "based *solely* on" criteria documents. Section 108 instead identifies information that criteria documents must "include," but are not necessarily limited to—the information listed in subparagraphs (A), (B), and (C) of section 108(a)(2). The Act then directs EPA to consider the Criteria Document *in conjunction with* other informational sources, including the "findings, recommendations and comments" of CASAC, CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3), plus "written comments, data, or documentary information" submitted by the public, CAA § 307(d)(4)(B)(i), 42 U.S.C. § 7607(d)(4)(B)(i). Moreover, Congress plainly expected that all of these data—even those outside the Criteria Document—would be

part of the Administrator's decisionmaking data set. The Act thus expressly provides that EPA must respond to significant public "comments, criticism, and new data," CAA § 307(d)(6)(B), 42 U.S.C. § 7607(d)(6)(B), and offer "an explanation of the reasons" for departures from CASAC's recommendations. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3).

Congress also made plain that compliance cost data, again including data not contained in a Criteria Document, are among the types of information that EPA necessarily must consider. The 1970 amendments added not just section 109(b), but also an elaborated requirement in section 108(b) that EPA issue—"simultaneously" with the Criteria Document and *before* EPA opens a NAAQS rulemaking—"information" on the "cost" of "air pollution control techniques." CAA § 108(b)(1), 42 U.S.C. § 7408(b)(1). Section 108(b)(1) mandates that this cost information be provided to "states and appropriate air pollution control agencies," "announced in the Federal Register," and "made available to the general public." CAA § 108(d), 42 U.S.C. § 7408(d). Given the Act's extensive procedural provisions, the requirement that cost information be provided *simultaneously* with a criteria document means that it must be made available at least three or four years before States begin planning compliance with a revised NAAQS. In the meantime, EPA must provide time for CASAC review, issue a proposal to revise a NAAQS, promulgate a final NAAQS, and make area designations of compliance or non-compliance with the new standard. *See* CAA § 107(d), 42 U.S.C. § 7407(d). The self-evident purpose of section 108(b)(1)'s otherwise inexplicably premature mandate must be to equip States, localities, and others with the information needed to criticize EPA's consideration of compliance costs in NAAQS standard-setting proceedings. *Cf.* CAA § 307(d)(6)(B), 42 U.S.C. § 7607(d)(6)(B) (EPA required to "respond to significant" public "comments, criticism, *and new data*") (emphasis added).

If there were any doubt on this point, it was laid to rest by the 1977 Amendments, which added the requirement that CASAC "advise the Administrator" on both health considerations *and* countervailing factors, including "*any* adverse public health, welfare, *social, economic, or energy effects* which may result from various strategies for attainment and maintenance of" the NAAQS. CAA § 109(d)(2)(C)(iv), 42 U.S.C. § 7409(d)(2)(C)(iv) (emphasis added). EPA cannot seriously maintain that this required advice was to play no role in the setting of revised NAAQS, for the Act also expressly specifies that whenever EPA notices proposed NAAQS revisions, it must summarize "*any* pertinent findings, recommendations, and comments" by CASAC (including advice under section 109(d)(2)(C)(iv)), and justify any significant departures from CASAC's recommendations. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3) (emphasis added); *accord* H.R. Rep. 95-294, 95th Cong., 1st Sess. 10 (1977) ("In deciding whether revision or promulgation of a new standard is necessary, the Administrator must consider the advice of an independent scientific review committee.").

The court below incorrectly rejected this interpretation, however, claiming that section 109(d)(2)(C)(iv) is aimed largely at state officials and NAAQS implementation efforts. *See* Pet. App. 21a. But that reading is contradicted by both the provision's text and the statutory structure. Section 109(d)(2)(C)(iv) could not be clearer—the advice called for by that provision is to be given to "the Administrator," not to State officials. Moreover, section 109, by its terms, exclusively concerns the setting of NAAQS by the EPA Administrator. It is other sections of the Act, including section 110 and all of Subpart 2 of Part D of Title I, that govern NAAQS implementation by the States. Accordingly, both the plain language and the placement of section 109(d)(2)(C)(iv) compel the conclusion that CASAC's economic advice is intended to be used in setting NAAQS.

C. The Statutory Purpose Confirms that EPA Must Consider Non-Health Factors in Setting NAAQS.

Considering all of the above provisions "in light of" the Act's "purposes and legislative history," *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 (1974), further reinforces the requirement that EPA engage in a commonsense weighing of benefits and costs. The first purpose of the Act, stated in section 101(b)(1), is "to protect and enhance the quality of the Nation's air resources *so as* to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1) (emphasis added). This statement of purpose underscores that NAAQS, the engine that drives the national pollution control program, must be geared to provide "public health" protection as traditionally defined. It also makes plain that the aim of the Act is *not* to protect the Nation's air resources for their own sake, but "*so as*" to "promote public health and welfare and *the productive capacity* of its population." *Id.* (emphasis added). This statement is a reminder that in the Clean Air Act, "public health and welfare" can never be divorced from "the productive capacity" upon which both necessarily depend.[2]

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[2] The legislative history reinforces this point. The 1970 committee reports do not directly address the question whether compliance costs should be considered in setting NAAQS, apparently because Congress simply assumed that benefits would dwarf those costs. A study in the Congressional Record thus estimates that air pollution imposed costs on the economy that "amount to many billions of dollars a year." Legislative History of the Clean Air Act Amendments of 1970, Vol. I at 248-49. The National Institute of Environmental Health further estimated "[t]he cost of environmentally induced disease" alone to be "*$38 billion* a year." *Id.* at 124 (emphasis added). By contrast, control costs were expected to total only *$2.6 billion* through 1975, plus an additional $1.9 billion in 1975, *id.* at 249—an estimate that in retrospect proved far too low. *See* Mark K. Landy, *et al.*, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON 67-70 (1994).

Given the Act's codified purpose and the traditional understanding of "public health," EPA is compelled to ask in each case whether its NAAQS will do more good than harm for public. The record here almost certainly produces a negative answer for ozone and, quite possibly, a negative answer for PM as well. EPA's ozone RIA, for example, shows that annual ozone compliance costs will exceed benefits by $1.1 billion to $8.1 billion for each year by 2010. RIA at ES-11, ES-17. By contrast, the high-end estimate of EPA's PM RIA purports to show net benefits. But, if CASAC's reservations about fine-particle mortality are credited, the predicted benefits fall to EPA's low-end estimate, which means that costs also exceed benefits for full attainment of the PM NAAQS. *See supra* at 19. Moreover, government officials outside EPA have uniformly faulted EPA's projected compliance costs for both ozone and PM as significantly understated. *See supra* at 11, 19. Finally, EPA's benefit estimates for both rules omit all offsets for health "disbenefits" of lower pollution levels, such as the diminished ground-level screening of ultra-violet radiation that OMB analysts project could be "similar in magnitude to the respiratory-related beneficial effects of [an ozone] reduction." OJA at 2759, 2764; *see also id.* at 3089; *supra* at 8-9.

III. EPA MAY ACTUALLY BE CONSIDERING NON-HEALTH FACTORS IN SETTING NAAQS WHILE USING *LEAD INDUSTRIES* AS A SHIELD AGAINST EXECUTIVE, CONGRESSIONAL AND JUDICIAL OVERSIGHT.

The history of past revisions to the ozone and PM standards shows that economic considerations almost inevitably play a role in setting NAAQS, and, equally significantly, that economic analyses can push decisionmakers in the direction of both more lenient standards (as in the 1979 ozone revisions) and more stringent ones (as in the 1987 PM revisions). In revising the ozone NAAQS in 1979, Administrator Costle admittedly took costs into account. In that case, the Regulatory

Analysis Review Group, established by a Carter Administration Executive Order, prepared detailed estimates of expected compliance costs assuming various NAAQS levels. *See* Mark K. Landy, *et al.*, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON 67-70 (1994). Despite EPA's interpretation that non-health factors were excluded from consideration, these estimates were carefully considered by Administrator Costle and were the centerpiece of heated debates between EPA and the Council of Economic Advisors over the appropriate level of a revised NAAQS. *Id.* at 70-73. Administrator Costle later admitted that the level he selected took into account both medical and economic considerations. *See* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1641-43 (1995).

The story was much the same when EPA last revised the PM NAAQS in 1987, albeit with a twist. There, the EPA Office of Policy Analysis prepared a cost-benefit assessment that tended to support selecting the new PM NAAQS from the lower end of the range proposed by the Staff Paper. *See* Thomas O. McGarity, REINVENTING RATIONALITY 47-48 (1991). Administrator Ruckelshaus, while expressing consternation that "he could not consider the cost and benefit information," stated nonetheless that the RIA (which was an outgrowth of this earlier economics staff analysis) "played no role whatsoever in his decisionmaking process . . . because he declined to read it." *Id.* at 50, 61. Still, "the knowledge among lower-level work group participants and midlevel managers [of the cost-benefit analysis] no doubt increased their comfort with recommending that the Administrator choose an option from the low end of the range." *Id.* at 61.

In light of this history, it certainly would not be surprising if EPA staff (or even the Administrator herself) privately consulted the available economic studies in setting these revised NAAQS. Indeed, the D.C. Circuit reversed the

Administrator for running afoul of *Lead Industries* by relying on a "pragmatic" consideration—specifically, "administrative convenience"—in selecting PM_{10} as the indicator for coarse PM. *See* Pet. App. 52a-53a; *supra* at 17. The Administrator also relied expressly on "efficien[cy]" concerns in deciding to promulgate both an annual and a 24-hour NAAQS for $PM_{2.5}$. *See* 62 Fed. Reg. at 38,670; *supra* at 17. And simultaneously with the issuance of the NAAQS, the Administrator issued a "soft" $10,000 compliance-cost cap per ton of emissions reductions based on the RIA. *See* 62 Fed. Reg. at 38,429.

As demonstrated below, this suggestive evidence raises still more fundamental questions about the viability of *Lead Industries*. The possibility that the Administrator may have considered supposedly non-health factors here, coupled with the fact that EPA routinely reads analogous Clean Air Act provisions to *permit* consideration of such factors, counsels the utmost skepticism when confronting EPA's continuing embrace of *Lead Industries*. *See* Part III.A, *infra*. And even more important, *Lead Industries* improperly shields EPA's decisionmaking from otherwise applicable executive, congressional and judicial oversight mechanisms. *See* Part III.B, *infra*. These two points present further grounds for rejecting *Lead Industries*.

A. EPA Cannot Distinguish NAAQS Standard-Setting from Analogous Clean Air Act Provisions Where the Agency Has Successfully Argued that Non-Health Factors May Be Considered.

Notwithstanding *Lead Industries*, EPA has successfully argued that similarly worded Clean Air Act provisions permit consideration of supposedly non-health factors, most recently in *State of Michigan v. EPA*, No. 98-1497, 2000 WL 180650 (D.C. Cir. Mar. 3, 2000). *State of Michigan* involved an interstate pollution transport provision prohibiting "any air pollutant in amounts which will . . . contribute *significantly*" to nonattainment of the national standards. CAA

§ 7410(a)(2)(D)(i)(I); 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). EPA argued this provision allows it to require upwind States to impose "highly cost-effective controls," namely controls capable of removing NOx at "a cost of $2,000 or less per ton." 2000 WL 180650, at *8.

The D.C. Circuit accepted EPA's interpretation based on an analysis that began by posing the following question: "[C]an an agency sensibly decide whether a risk is '*significant*' without also examining the *cost* of eliminating it?" *Id.* at *11 (internal quotation omitted). The court then ruled: "It is only where there is a 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *Id.* at *12. Turning to the provision at issue, the court acknowledged that, like other provisions of the Act, it was "[a] mandate directed to some environmental benefit . . . phrased in general quantitative terms ('ample margin of safety,' 'substantial restoration,' and 'major'), [that] contains not a word alluding to non-health tradeoffs." *Id.* After discussing its precedents interpreting these provisions, the court concluded that "in each case we found that in making its judgments of degree the agency was free to consider the costs of demanding higher levels of environmental benefit. So too here." *Id.*

Nor is *State of Michigan* the first D.C. Circuit case to uphold EPA's authority to consider compliance costs under Clean Air Act provisions that aim to improve air quality. *George E. Warren v. EPA*, for example, upholds consideration of costs under the Act's anti-dumping provision, CAA § 211(k)(8), 42 U.S.C. § 7545(k)(8), which requires that conventional gasoline from each supplier remain as clean as it was in 1990. 159 F.3d 616, 623 (D.C. Cir. 1998). Similarly, *NRDC v. EPA* upholds EPA's use of a cost-benefit analysis in determining whether to add various categories of industrial sources to the list of "major" sources under the Act's "prevention of significant deterioration" provisions. 937 F.2d

641, 643 (D.C. Cir. 1991). And, of course, the D.C. Circuit, sitting *en banc* in *Vinyl Chloride*, has also upheld consideration of costs in setting "ample margins of safety" for hazardous air-pollutant limitations. 824 F.2d at 1154-58.

In short, EPA's bald assertion of a NAAQS exception to otherwise well-established interpretive practice is unavailing. Certainly, this claimed exception finds no support in the statutory context or text. *See* Parts I and II, *supra*. Moreover, even if the Act did not require that countervailing factors be considered, EPA still could not maintain that it is permitted to ignore those factors, given *Brown & Williamson* and similar decisions of this Court. *See supra* at 31-32.

B. Rejecting *Lead Industries* Will Help to Insure Effective Executive, Congressional and Judicial Oversight for NAAQS Standard-Setting.

The well-established Executive Branch mechanisms for overseeing agency rulemaking will work in the NAAQS context only if *Lead Industries* is rejected. For over twenty-five years, the Office of the President has overseen most major regulatory initiatives by requiring steps designed to ensure that such programs are cost-beneficial and cost-effective. President Clinton's Executive Order 12,866, like similar Orders from previous Presidents, is directly enforced by the Executive, not the Judiciary. *See* 58 Fed. Reg. 51,735, § 10 (Sept. 30, 1993). The stated "philosophy" of that Order is that "agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." *Id.* § 1(a). "Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be measured) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." *Id.*

Significantly, however, the Order provides that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits

(including potential economic, environmental, public health and safety, and other advantages; distributional impacts; and equity), *unless a statute requires another regulatory approach.*" *Id.* (emphasis added). This highlighted proviso is then elaborated in section 1(b), which provides that the agencies must adhere to these principles only "*to the extent permitted by law.*" Given this proviso, NAAQS standard-setting will enjoy a blanket exemption from Presidential regulatory oversight so long as *Lead Industries* is the law.

Lead Industries poses essentially the same problems for congressional regulatory oversight. In 1995, Congress enacted the Unfunded Mandates Reform Act ("UMRA"), 2 U.S.C. § 1501 *et seq.*, to "requir[e] that Federal agencies . . . consider estimates of the budgetary impact of regulations . . . upon State, local and tribal governments and the private sector." *Id.* § 1501(7)(B). Congress further directed that, in promulgating each major proposed rule, the agency prepare a document that includes "a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate," *id.* § 1532(a)(2); *see also id.* § 1511(a), and then select the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule," *id.* § 1535(a). As with Executive Order 12,866, however, UMRA's provisions, which are directly enforced by Congress, rather than the courts, apply only unless otherwise prohibited by law. *See id.* §§ 1532(a), 1535(b)(2). This exception likewise means that congressional oversight of NAAQS standard-setting under UMRA will not apply unless *Lead Industries* is rejected.

Lead Industries also threatens, for precisely the same reasons, the very foundations of effective judicial review. The Clean Air Act, like the APA, requires the Agency to engage in reasoned, non-arbitrary decisionmaking. *See* CAA § 307(d)(9), 42 U.S.C. § 7607(d)(9). Under this form of traditional rationality review, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by

which it reaches that result must be logical and rational." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). A necessary foundation for that review is the "strict and demanding requirement" that "an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Otherwise, the courts could not begin to determine whether the agency had exercised its discretion in a reasoned manner, and "expertise, the strength of modern government, [would] become a monster which rules with no practical limits on its discretion." *Id.*

To the extent that EPA actually considers costs, while maintaining publicly that it does not, *Lead Industries* jeopardizes the fundamental presuppositions under which Congress delegates authority to EPA in the first instance. The "recognition of Congress' need to vest administrative agencies with [delegated authority] carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision . . . ." *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 (1986) (plurality opinion). This requirement that agencies explain the actual basis for their decision "helps maintain public accountability" by exposing those decisions to public and congressional scrutiny. *See, e.g., American Med. Ass'n v. Reno*, 57 F.3d 1129, 1134 (D.C. Cir. 1995).

Finally, the alternative possibility that EPA truly is *not* considering costs runs afoul of a different reasoned decisionmaking requirement—the requirement that agencies undertake "consideration of the relevant factors" and "consider [each] important aspect of the problem." *State Farm*, 463 U.S. at 42. Non-health factors are "relevant" for NAAQS standard-setting for all of the statutory reasons detailed above. But it is not just the Clean Air Act itself that establishes their relevance; all of the most important decisionmakers in the NAAQS context have also deemed such factors critical to making the kind of hard choices that EPA necessarily must make in setting

NAAQS. That is true for EPA, as in *State of Michigan*, for President Clinton, as in Executive Order 12,866, and for Congress, as in the UMRA legislation.

UMRA is particularly instructive because it represents a *congressional* determination that costs are relevant, and thus should be considered under this Court's earlier decision in *State Farm*. As Judge Garland recently explained for the D.C. Circuit, the courts "may consider [such statutes] in determining whether EPA complied with the overall requirement that an agency's decisionmaking be neither arbitrary nor capricious," even though they are not judicially-enforceable in their own right. *Allied Local & Regional Mfrs. Caucus v. EPA*, No. 98-1526, 2000 WL 737750, at *16 (D.C. Cir. June 16, 2000) (interpreting UMRA and an analogous statute); *accord Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984) (Scalia, J.) ("To say that an agency's compliance with [the statute] is not reviewable as such is not to say that the agency can ignore with impunity the effect of its rules").

In sum, the context, text, structure, and purpose of the Act, as well as related sources of law, all confirm that EPA must consider countervailing "non-health" factors in setting NAAQS. If there were any doubt on that score, however, nondelegation considerations would require that they be resolved in favor of considering costs and other countervailing factors. The reasons why the nondelegation doctrine independently requires that *Lead Industries* be repudiated will be explained in our next brief.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals to the extent that it precludes EPA from considering factors other than health effects relating to pollutants in the air, and order that court to vacate EPA's ozone and PM NAAQS and remand for EPA to reconsider its standards under a proper interpretation of the Act.

APPENDIX

CAA § 101, 42 U.S.C. § 7401. Congressional findings and declaration of purpose

(a) Findings—

The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

CAA § 108, 42 U.S.C. § 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology

and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

****

CAA § 109, 42 U.S.C. § 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient

air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

****

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

****

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

CAA § 307, 42 U.S.C. § 7607. Administrative proceedings and judicial review

****

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

****

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

****

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information . . . .

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

****

Unfunded Mandates Reform Act, 2 U.S.C. § 1501. Purposes

The purposes of this chapter are—

(1) to strengthen the partnership between the Federal Government and State, local, and tribal governments;

(2) to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities;

(3) to assist Congress in its consideration of proposed legislation establishing or revising Federal programs containing Federal mandates affecting State, local, and tribal governments, and the private sector by—

(A) providing for the development of information about the nature and size of mandates in proposed legislation; and

(B) establishing a mechanism to bring such information to the attention of the Senate and the House of Representatives before the Senate and the House of Representatives vote on proposed legislation;

(4) to promote informed and deliberate decisions by Congress on the appropriateness of Federal mandates in any particular instance;

(5) to require that Congress consider whether to provide funding to assist State, local, and tribal governments in complying with Federal mandates, to require analyses of the impact of private sector mandates, and through the dissemination of that information provide informed and deliberate decisions by Congress and Federal agencies and retain competitive balance between the public and private sectors;

(6) to establish a point-of-order vote on the consideration in the Senate and House of Representatives of legislation containing significant Federal intergovernmental

mandates without providing adequate funding to comply with such mandates;

(7) to assist Federal agencies in their consideration of proposed regulations affecting State, local, and tribal governments, by—

(A) requiring that Federal agencies develop a process to enable the elected and other officials of State, local, and tribal governments to provide input when Federal agencies are developing regulations; and

(B) requiring that Federal agencies prepare and consider estimates of the budgetary impact of regulations containing Federal mandates upon State, local, and tribal governments and the private sector before adopting such regulations, and ensuring that small governments are given special consideration in that process; and

(8) to begin consideration of the effect of previously imposed Federal mandates, including the impact on State, local, and tribal governments of Federal court interpretations of Federal statutes and regulations that impose Federal intergovernmental mandates.

Unfunded Mandates Reform Act, 2 U.S.C. § 1511. Cost of regulations

(a) Sense of the Congress

It is the sense of the Congress that Federal agencies should review and evaluate planned regulations to ensure that the cost estimates provided by the Congressional Budget Office will be carefully considered as regulations are promulgated.

****

2 U.S.C. § 1532. Statements to accompany significant regulatory actions

(a) In general

Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement containing—

(1) an identification of the provision of Federal law under which the rule is being promulgated;

(2) a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as the effect of the Federal mandate on health, safety, and the natural environment and such an assessment shall include—

(A) an analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance (or otherwise paid for by the Federal Government); and

(B) the extent to which there are available Federal resources to carry out the intergovernmental mandate;

(3) estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of—

(A) the future compliance costs of the Federal mandate; and

(B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector;

(4) estimates by the agency of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material; and

(5)(A) a description of the extent of the agency's prior consultation with elected representatives (under section 1534 of this title) of the affected State, local, and tribal governments;

(B) a summary of the comments and concerns that were presented by State, local, or tribal governments either orally or in writing to the agency; and

(C) a summary of the agency's evaluation of those comments and concerns.

(b) Promulgation

In promulgating a general notice of proposed rulemaking or a final rule for which a statement under subsection (a) of this section is required, the agency shall include in the promulgation a summary of the information contained in the statement.

(c) Preparation in conjunction with other statement

Any agency may prepare any statement required under subsection (a) of this section in conjunction with or as a part of any other statement or analysis, provided that the statement or analysis satisfies the provisions of subsection (a) of this section.

§ 1535. Least burdensome option or explanation required

(a) In general

Except as provided in subsection (b) of this section, before promulgating any rule for which a written statement is required under section 1532 of this title, the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, for—

(1) State, local, and tribal governments, in the case of a rule containing a Federal intergovernmental mandate; and

(2) the private sector, in the case of a rule containing a Federal private sector mandate.

(b) Exception

The provisions of subsection (a) of this section shall apply unless—

(1) the head of the affected agency publishes with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted; or

(2) the provisions are inconsistent with law.

(c) OMB certification

No later than 1 year after March 22, 1995, the Director of the Office of Management and Budget shall certify to Congress, with a written explanation, agency compliance with this section and include in that certification agencies and rulemakings that fail to adequately comply with this section.

Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive Order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Statement of Regulatory Philosophy and Principles.

(a) The Regulatory Philosophy. Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private

markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) The Principles of Regulation. To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In

addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

****

Section 10. Judicial Review.

Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.*,*

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTRODUCTION

As demonstrated in our briefs as cross-petitioners and respondents, the Clean Air Act ("CAA" or "the Act"), properly construed, requires that the Administrator consider competing factors including costs in setting National Ambient Air Quality Standards ("NAAQS"). *See* Cross-Pet. Br. 32-43; ATA Resp. in No. 99-1257, at 3-4, 21-22. Judging "public health" by "a systematic weighing" of competing factors comparable to that required by Executive Order 12,866 provides the Administrator with the "intelligible principle" necessary to satisfy constitutional requirements and channel her NAAQS rulemaking so as to permit judicial review on customary rationality grounds. *Id.* at 11-25; Cross-Pet. Br. 30-32, 47-50.

The Administrator and her supporters seek to sidestep these points by mischaracterizing NAAQS as mere "air quality targets," EPA Resp. 3, "more akin to statutory policy objectives" than actual standards, Mass. Resp. 2, and then by pretending that ATA has argued that NAAQS should be set by an "economic and technological *feasibility*" test. EPA Resp. 3 (emphasis added); *see also id.* at 14, 16, 17, 18, 19 (repeatedly mentioning "feasibility" or "technological feasibility" as ATA's basis for setting NAAQS). But far from being simply "targets" or "policy objectives," NAAQS trigger the imposition of numerous mandatory requirements (CAA §§ 171-75, 42 U.S.C. §§ 7501-05) that are legally enforceable through federal sanctions on States ("highway sanctions," CAA § 179(b)(1), 42 U.S.C. § 7509(b)(1)) and the private sector (emissions "offsets" for new or modified sources, CAA § 179(b)(2), 42 U.S.C. § 7509 (b)(2)). Nor has ATA ever argued that NAAQS should be set based on "feasibility"—an entirely different concept from "cost-benefit analysis" or "public health" under this Court's decisions and the Clean Air Act.

This Court's decision in *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 509 (1981) ("*Cotton Dust*"), thus carefully distinguishes between "feasibility analysis" and "cost-benefit analysis," and then holds that a cost-benefit analysis is foreclosed for toxic substance workplace

standards (as opposed to safety standards) because section 6(b)(5) of the Occupational Health and Safety Act instead provides a feasibility test for setting those standards. Likewise, the Court's decision in *Union Electric Co. v. EPA*, 427 U.S. 246, 249 (1976), specifically addresses only whether the petitioner could "raise the claim that it is economically or technologically infeasible to comply" with emissions limitations included in a State Implementation Plan ("SIP") required under a NAAQS set by EPA. That decision does not address the separate question of how the Administrator should make public health determinations, but it does foreclose altogether the Administrator's argument here that NAAQS are simply "targets" until "feasibility" is resolved by EPA at a later stage. *See id.* at 265.

As we show, the concept of "public health" underlying the setting of NAAQS rejects a feasibility test in favor of a weighing of competing considerations, a point amply confirmed not only by the meaning of the term "public health" but also by the statutory structure and legislative history. *See* Cross-Pet. Br. 33-42; pp. 8-19, *infra*. Nor is there any reason to believe that setting NAAQS on such a public health basis would systematically lead either to less stringent (or more stringent) ambient standards, much less produce the "chaos" predicted by the Administrator's supporters. *See, e.g.*, Cal. *Amici* Br. 2. In fact, because cost-benefit analysis is a neutral tool, agency officials may try to use it in some circumstances to attempt to justify more stringent standards than either a feasibility test, *see, e.g., International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1326 (D.C. Cir. 1991); *cf.* Cross-Pet. Br. 42 n.2, or the standardless approach that the Administrator followed in setting these NAAQS, *see* Cross-Pet. Br. 44-45 (discussing the role of cost-benefit analysis in setting of PM_{10} NAAQS in 1987).

In this Reply, we show that science alone does not suffice to make the public policy choices necessary in setting NAAQS, and that this Court's decisions preclude any suggestion that

Congress implicitly delegated to the Administrator authority to make choices of such "economic and political significance" without considering competing factors including costs. *See* Part I, *infra*. Instead, Congress directed the Administrator to set NAAQS based on the public health as a means of authorizing the Administrator to perform equitable balancing of the sort previously carried out by courts and the States—a conclusion confirmed by the traditional meaning of public health as well as by the statutory text and structure, and even the legislative history cited by the Administrator herself. *See* Part II, *infra*. Finally, any application of *stare decisis* here would defeat the aim of transparent decisionmaking, ignore the fact that *Lead Industries* lacks precedential authority even in the D.C. Circuit, and undercut the fundamental rule that denials of *certiorari* carry no precedential weight in this Court. *See* Part III, *infra*.

ARGUMENT

Cloaked in the mantle of *Lead Industries*, the Administrator claims that science alone allows her to judge which particular numeric NAAQS level is "requisite to protect the public health" "with an adequate margin of safety." That claim, belied by logic and contradicted by her own admissions, *see* Cross-Pet. Br. 8, 16, 29-30; ATA Resp. in No. 99-1257, at 11, 17-21, produced the constitutional nondelegation infirmity identified by the D.C. Circuit. *See* Gen. Elec. *Amicus* Br. in No. 99-1257, at 1-4; Mercatus Center *Amicus* Brs.; *see generally* David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807 (1999). But for reasons already presented, *see* Cross-Pet. Br. 32-43, and further developed below, this Court may properly resolve this case by repudiating *Lead Industries* on ordinary statutory interpretation grounds, thus defusing the constitutional questions it would otherwise be forced to confront. *See* ATA Resp. in No. 99-1257, at 11-14, 21-25.

I. THE ADMINISTRATOR HAS NO ANSWER FOR OUR ARGUMENTS THAT THIS COURT'S DECISIONS UNDERMINE THE *LEAD INDUSTRIES* DOCTRINE.

Lead Industries assumes an extraordinarily extravagant delegation of legislative power to the Administrator. In the context of regulations that dramatically affect the whole economy, *Lead Industries* presupposes that Congress delegated to the Administrator the authority to set NAAQS without any consideration of competing considerations. *See* ATA Resp. in No. 99-1257, at 9-10. But as this Court's decisions show, "Congress could not have intended to delegate" to the Administrator "a decision of such economic and political significance . . . in so cryptic a fashion." *See FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000); *MCI v. AT&T*, 512 U.S. 218, 231 (1994); *Christensen v. Harris County*, 120 S. Ct. 1655, 1664 n.1 (2000) (Scalia J., concurring); *id.* at 1667 (Breyer, J., dissenting). The Administrator offers no response to these decisions; indeed, the only one of her supporters to mention them merely makes the correct but irrelevant point that these decisions do not "deal with the Clean Air Act, the consideration of costs under environmental statutes, or the use of cost-benefit analysis." Environmental Defense *Amici* Br. 16-19.

Rather than grapple with the inherent limits of congressional delegation under this Court's decisions, the Administrator contents herself with arguing that she can set NAAQS based on science alone, consistent with both the Act and the nondelegation doctrine. EPA Resp. 32-34. But that proposition is simply not defensible. The Administrator, accepting *Lead Industries*, had but two logical alternatives available—set the ozone and PM NAAQS "at zero" *or* select a non-zero standard without considering competing factors in favor of or against any particular NAAQS. *See* Pet. App. 15a; Cross-Pet. Br. 28-32. The Administrator denies that these are the only logical alternatives, *see* EPA Resp. 32-34, but she

never confronts the core insight underlying the lower court's analysis—specifically, that "[s]cience *describes*, it does not *prescribe*." *See* Marchant *Amici* Br. in No. 99-1257, at 5 (emphasis added). As the National Academy of Sciences has said, "science alone can never be an adequate basis for a risk decision" because such decisions "are, ultimately, public policy choices" which turn on "political, economic, and technical considerations." *Id.* at 6-7 (quoting NAS Red Book at 19 & 7) (emphasis added). Indeed, *Lead Industries* itself recognizes that the selection of a NAAQS "presents complex questions of science, law, *and* social policy under the Act." *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir. 1980) (emphasis added). Of course, it is precisely because science alone is inadequate for deciding public policy questions that the Administrator can identify no intelligible principle that cabined her decisionmaking here, *see* ATA Resp. in No. 99-1257, at 11-12, and that her attempts to justify her decisions on science alone are so contradictory and unpersuasive. *See id.* at 17-21; *accord* Hatch *Amici* Br. in No. 99-1257, at 13-17, 26-30.

The Administrator's claimed basis for saying that science alone *is* somehow decisive on this record begins by conceding that she has "never encountered" facts that would warrant setting a zero level standard, EPA Resp. 32, or even a zero-risk standard (taking into account "risk-risk" tradeoffs). *See* Marchant *Amici* Br. in No. 99-1257, at 16 (noting this type of zero-risk approach). The Administrator and her supporters go on to argue that a non-zero standard is not arbitrary even for non-threshold pollutants. *See* EPA Resp. 33-34; Mass. Resp. 42-43. This contention, couched in multiple double negatives, *see, e.g.*, Mass. Resp. 43, is refuted by the Administrator's own repeated concessions about her decisionmaking process, *see* ATA Resp. in No. 99-1257, at 11, 17-21, as well as by the simple fact that, "unless the Administrator affirmatively determines a health effects threshold and sets the standard with that threshold as the starting point, there will always be 'possible, but not certain' health effects at every level." *Id.* at

19 (quoting 62 Fed. Reg. 38,652, 38,678 (July 18, 1997)); *see also* Gen. Elec. *Amicus* Br. in 99-1257, at 24-26. The Administrator's apparent answer is that she can regulate only "medically significant risks," EPA Resp. 33—a formulation indistinguishable from other formulations that she has always categorically rejected. *See, e.g.*, 62 Fed. Reg. 38,856, 38,883 (July 18, 1997) (no requirement that she determine "what risk is 'acceptable'"); Resp. Br. in D.C. Cir. No. 97-1441, at 42 & n.40 (Administrator not required to "make a 'finding' that the existing standard permits a 'significant risk of harm' to public health."); *see also* MAPI Br. in No. 99-1257, at 4 n.4.

Certainly, the Administrator would *now* like to claim that science alone does provide the answers. But she repeatedly said just the opposite in the agency proceedings— specifically, that her decisions were "largely judgmental in nature" and followed "no generalized paradigm." 62 Fed. Reg. at 38,883. Likewise, the EPA Staff Paper expressly called the Administrator's decision a "policy judgment," OJA 1971-72, 1976, and CASAC concurred, saying that a collective scientific judgment was not possible, meaning that any recommendations from individual members were only "personal" policy preferences, *see id.* at 237. *See generally* Cross-Pet. Br. 6-8, 13-15.

Because a zero-risk standard is clearly unavailable under the Act, *see Pegram v. Herdrich*, 120 S. Ct. 2143, 2150 (2000), and science alone is unable to select from among the limitless possible NAAQS levels, "a systematic weighing" of competing considerations emerges as the logical choice for NAAQS standard-setting. *See* Cross-Pet. Br. 30; ATA Resp. in No. 99-1257, at 21-25. "Cost-benefit analysis," so defined, "is broad enough to include *properly performed* analyses under 'significant risk' and similar rubrics." *Id.* (emphasis added). Costs thus inevitably become part of those analyses. For example, when the ozone standard was first revised in 1979, then-Chairman of the EPA Science Advisory Board, James Whittenberger, repeatedly voiced the logical difficulties presented in deciding what might be "significant" health risks

"without considering the social and economic consequences of those decisions." Mark K. Landy, *et al.*, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON 53 (1994); *see also* Cross-Pet. Br. 45-47 (citing cases). Moreover, consideration of cost is also inherently part of the "Quality-Adjusted Life Years" approach suggested by the court below. *See* Robert Fabian, *The Qualy Approach, in* VALUING HEALTH FOR POLICY: AN ECONOMIC APPROACH 118, 120 (1994) ("The qualy method provides a utility-based cost-effectiveness analysis, often called cost-utility analysis.").

Even if the Act did not contemplate a form of equitable balancing in setting public health NAAQS, *see* pp. 8-19, *infra*, the Administrator would still lack implicit authority under this Court's decisions to ignore competing factors including costs. *See* Cross-Pet. Br. 25, 31-32, 47. The formal mechanisms for such balancing when setting NAAQS are already in place under Executive Order 12,866 and the utility of conducting such analyses has impressive support from a broad spectrum of leading economists and other public policy experts. *See* AEI-Brookings *Amici* Br. Indeed, if such analyses were only *permitted* under the Clean Air Act, then they would be *required* by the Unfunded Mandates Reform Act ("UMRA") and case law recognizing that an agency's refusal to consider factors deemed significant by Congress is inherently arbitrary and capricious. *See id.* at 11; Cross-Pet. Br. 50 (citing cases).

Finally, the Administrator and her supporters argue that expanding the factors she considers beyond strictly scientific matters would not solve the constitutional nondelegation problem presented by NAAQS standard-setting. *See* EPA Resp. 47-49. To be sure, if the Administrator deliberately disregarded the results of cost-benefit analyses conducted within her authority under the Act, that action would pose, not just nondelegation questions, but also grounds for reversal on customary APA rationality review grounds. *See* ATA Resp. in No. 99-1257, at 23. But as we have shown, interpreting the

Act to require that the Administrator consider competing factors including costs in setting the NAAQS would resolve the nondelegation question for the same reasons that weighing competing considerations resolves constitutional doubts when other agencies set numeric values or decide questions of degree in ratemaking and similar proceedings. *See id.* at 11-14.

II. CONGRESS DID NOT REPEAL THE PREEXISTING CLEAN AIR ACT PRACTICE OF CONSIDERING COMPETING FACTORS WHEN IN 1970 IT DIRECTED THE ADMINISTRATOR TO SET "PUBLIC HEALTH" NAAQS.

The Administrator's response to the statutory text discussed in our opening brief, *see* Cross-Pet. Br. 32-43, does not contest that the term "public health" in section 109(b) of the Act, 42 U.S.C. § 7409(b), must be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). She instead argues that the definition of public health that we cite does not constitute "its ordinary or natural dictionary meaning in light of the context in which it is used." EPA Resp. 36 (citation omitted). As demonstrated below, the Administrator is wrong both about the "dictionary meaning" of public health and about its meaning within the context of the Clean Air Act.

Our opening brief cites the seminal public health definition in C.E.A. Winslow's THE COST OF SICKNESS AND THE PRICE OF PUBLIC HEALTH, a 1951 World Health Organization study of the comparative costs and effectiveness of various measures for controlling tuberculosis. Cross-Pet. Br. 34. Winslow is credited by name in leading scientific dictionaries as providing the most authoritative definition of public health. *See id.* His formulation is thus the origin of the vast majority of public health definitions found both in scientific and general-usage contexts. *See, e.g.*, MERRIAM-WEBSTER'S MEDICAL DESK DICTIONARY 669 (1996); Naomi N. Modeste, DICTIONARY OF PUBLIC HEALTH PROMOTION AND EDUCATION: TERMS AND

CONCEPTS 95 (1996); STEDMAN'S MEDICAL DICTIONARY 689 (1995); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 944 (10th ed. 1994); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 932 (1987); THE AMERICAN HERITAGE ILLUSTRATED ENCYCLOPEDIC DICTIONARY 1363 (1987); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1836 (1976).

The Administrator counters these authorities in her footnote 28, *see* EPA Resp. 36, by attempting to combine the *separate* definitions of "public" and "health" found in WEBSTER'S THIRD. But surely the Administrator could not have overlooked the fact that WEBSTER'S THIRD defines the full term "public health," thus making unnecessary this contorted effort at combining separate definitions. Tellingly, the "public health" definition in WEBSTER'S THIRD—"the art and science dealing with the protection and improvement of community health by organized community effort and including preventative medicine and sanitary and social sciences"—not only closely parallels Winslow's, but also expressly recognizes the role played by the "social sciences" such as economics. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1836 (1976).

The BLACK'S LAW definition cited by the Administrator in the same footnote at least refers to the combined term "public health." But that definition, which mentions "health of the community at large," then goes on to reference "the methods of maintaining the health of the community, as by *preventative medicine* and *organized care* for the sick." BLACK'S LAW DICTIONARY 724 (7th ed. 1999) (emphasis added). That formulation, like so many others, brings to mind Winslow's discussion of preventative medical responses to tuberculosis, as well as the cost-of-care issues that, as this Court recently acknowledged, are inherent in any regime for "organized care for the sick." *Pegram*, 120 S. Ct. at 2150 (degree of "risk" that is "unacceptabl[e]" in HMO context necessarily "depend[s] on

a judgment about the appropriate level of expenditure for health care in light of the associated . . . risk"). *See also* Hatch *Amici* Br. in No. 99-1257, at 25 n.17.

Understandably, the Administrator does not challenge the fact that modern public health judgments about a wide array of matters are made on cost-benefit bases. *See* Cross-Pet. Br. 35 n.1 (citing examples). Rather, she implies that this reliance on cost-benefit analysis in public health matters may be a new phenomenon. But that is simply not the case. For example, on the eve of Congress' passage of the 1970 Clean Air Act Amendments, U.S. Public Health Service Administrator Charles C. Johnson, Jr., explained that the public health profession's concern should be "the *total* well-being of the citizen," and, accordingly, "since we are interested in the 'whole man,' let's see what [air pollution] costs us in economic terms." Charles C. Johnson, Jr., *Environmental Health Protection*, 24 Food Drug Cosmetic L.J. 348, 349, 355 (1969) (emphasis in original). Administrator Johnson's statement reflects a long tradition that continues to the present. *See, e.g.*, Barbara B. Perkins, *Public Health Then and Now: Economic Organization of Medicine and the Committee on the Costs of Medical Care*, 88 Am. J. Public Health 1721, 1724 (1998) (tracing concern with "the most economic use of capital" in public health from 1927 to modern-day HMOs); *accord Pegram*, 120 S. Ct. at 2150.

This public health tradition has been reflected in federal air pollution control law from its inception. Congress first used "public health" in the Air Pollution Control Act of 1955, which,"in recognition of the dangers to the *public health* and welfare," directed that the "*Public Health Service*" assist the Department of Health, Education, and Welfare ("HEW") in administering the Act. *See* Pub. L. 84-159, ch. 360, 69 Stat. 322, § 1 (1955) (emphasis added). Congress' goal, as reaffirmed in the Clean Air Act of 1963, was "air pollution abatement." *Id.*; *see also* Pub. L. 88-206, 77 Stat. 392, § 5(a) (1963). In 1963, Congress also expanded the 1955 Act's reach,

by authorizing federal courts to "abate" pollution that threatened "the *health* or welfare of *any persons*," with the courts deciding in each case, *inter alia*, what "the *public interest* and the *equities* of the case may require." *Id.* § 5(a, g) (emphasis added). This statutory distinction between the "health of any persons," and "the public interest and the equities" flowed from the Act's purposes: "to protect the Nation's air resources," but only "*so as*" necessary "to promote the *public health* and welfare and the productive capacity of its population." *Id.* § 1(b)(1) (emphasis added). In short, "public health" was the Act's overall goal, and Congress recognized that its achievement required that "the health . . . of any persons" be balanced along with the "public interest and equitable factors."

The required "abatement" of air pollution under this balancing approach naturally drew on public health nuisance law, which has always entailed an equitable balancing of countervailing factors. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (1992) ("state nuisance law ordinarily entails" consideration of countervailing factors, including "the social value of the [landowner's] activities"). In abating public health nuisances in the environmental context, courts thus seek to "strik[e] a balance" between adverse "health effects" and countervailing "social and economic consequences." *Reserve Mining Co. v. EPA*, 514 F.2d 492, 535-36 (8th Cir. 1975) (*en banc*) (reversing injunction abating a public health nuisance); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 107, 108 (1972) ("the informed judgment of the chancellor will largely govern" since courts are "empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution").

Within this public health tradition, Congress amended the Act in 1967 to direct States to set "ambient air quality standards." These standards would apply in public nuisance abatement actions brought (as before) whenever air pollution "endangers the health or welfare of any persons." *See* Air

Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485, § 108(a). HEW was to assist the States by developing scientific "criteria" documents and documents relating to "control techniques," and then recommending a "level of air quality." *Id.* § 107(b). The States were to set numeric standards "consistent with the air quality criteria" and the "recommended control techniques." *Id.* § 108(c)(1). As the Senate Report explained, these State standards were to be *prescriptive* because they would be: "[a]n expression of *public policy rather than scientific findings*" and accordingly their development would reflect "*economic, social, and technological considerations.*" S. Rep. No. 403 at 28 (1967) ("1967 Senate Report") (emphasis added). In addition, the 1967 Amendments also kept the 1963 Act's key distinction between "the equities of the case" and "the *technological and economic feasibility*" as applied in abatement actions. § 108(c)(4) (emphasis added).

The Administrator argues essentially that Congress made a black-to-white change from this previous regime when the Act was amended in 1970. In her view, Congress repealed all previous provisions for public health balancing or consideration of competing factors—the framework under which courts and States had administrated federal air pollution control law since 1955. EPA Resp. 21-25. She thus omits any mention of the preexisting judicial balancing in abatement actions and characterizes the State balancing of competing interests under the 1967 air quality standards as simply a failed "experiment" that Congress repealed wholesale. *Id.* at 24. Support for her theory consists primarily in the fact that Congress' new standard-setting provision (section 109(b)) omits express reference to the "recommended control techniques" and specifically states that NAAQS should be "based on such criteria," meaning the air quality criteria called for in section 108(a)(2), 42 U.S.C. § 7408(a)(2). *See* EPA Resp. 22-25. The consequence of this change, according to the Administrator, is that NAAQS are to be determined exclusively by science—in her words, "based on air quality"—"*alone.*" *Id.* at 24 (emphasis

added). As for "feasibility and the effects of implementing the standards," the Administrator says these were left "for later stages in the regulatory process." *Id.*

The Administrator simply fails to prove this black-to-white theory of the 1970 Amendments. Initially, the Administrator's theory is undercut by the new section 109(b) which added the term "judgment," suggesting that the Administrator should apply ordinary rationality in setting NAAQS—specifically, that she avoid taking actions that do "more harm than good." *See* Antonin Scalia, *Regulation—The First Year*, REGULATION, Jan./Feb. 1982 at 19-20. Equally significant, the Administrator's "science only" interpretation of section 109(b) would, in her words, require that she provide all the protection suggested by science to "the general population, or identifiable groups within communities," as distinguished from "any specific individual." EPA Resp. 36 & n.28. But that concept (protecting the "health of any persons") was precisely what Congress rejected when it substituted public health NAAQS for the pre-1970 abatement trigger—pollution that "endangers the health or welfare of any *persons*" in the plural. *See* Cross-Pet. Br. 33-34. This reference to protection of "persons" in the plural, as distinct from "any specific individual," was so central under the 1967 Act that it appears no fewer than *thirteen* times.

The significance of Congress' move away from the "health of any persons" in 1967 to "public health" is revealed by the 1970 legislative history. The bill passed by the Senate in 1970 would indeed have required that NAAQS be set at the level "necessary to protect *the health of persons.*" S. 4358, 91st Cong., § 110(a)(3) (1970), *reprinted in* I Senate Comm. on Env. and Public Works, 93d Cong., *Legislative History of the Clean Air Amendments of 1970* (committee print 1974), at 486 (1974) (emphasis added) ("*1970 Legislative History*"). In addition, that Senate bill would also have required that States attain the NAAQS within a fixed period of time, irrespective of *either* equitable considerations *or* feasibility—the concepts that had limited abatement actions since 1963. *See id.*

§ 111(a)(2)(A), *I 1970 Legislative History*, at 487. The bill passed by the House, by contrast, transferred the equitable balancing authority previously carried out by the courts and the States to EPA which was directed to set NAAQS that protect "the public health." *See* H.R. 17255, 91st Cong., § 2(a) (1970), *reprinted in II 1970 Legislative History*, at 911. Unlike the Senate bill, the House would have provided no fixed deadlines for attainment. *See id.* § 4(a)(1), *reprinted in II 1970 Legislative History*, at 914.

The Conference Committee reconciled these competing approaches by accepting the House's "public health" test together with the Senate's fixed attainment deadlines. *See* H.R. 91-1783, 91st Cong. (1970), *reprinted in I 1970 Legislative History*, at 194 (Committee Report, Statement of the Managers on the Part of the House). Congress thus rejected the "health of persons" standard favored by the Senate, and overrode the feasibility limitations contained in the Act since 1963. But it did not repeal the Act's previous balancing of competing factors—factors that are inherent in the traditional concept of public health taken from the House bill. Not surprisingly, the Administrator's legislative history citations sometimes discuss the Senate bill's (ultimately rejected) "health of persons" standard and sometimes discuss its (ultimately accepted) fixed attainment deadlines, but *never* discuss the House-originated concept of "public health"—the only issue presently before the Court. *See* EPA Resp. 25-27. Indeed, the legislative history cited most prominently by the Administrator affirmatively supports our point—namely, that Congress embraced public health while rejecting the "concept of technical feasibility as the basis of ambient air standards," with the consequence that "existing sources of pollutants either should meet the standard of the law or be shut down." EPA Resp. 26 (quoting from 1970 Senate Report).

The Administrator's supposed structural arguments for why NAAQS are to be set based on air quality "alone" fare no better. First, the text of section 109(b) omits words of

limitation such as "only," "solely" or "alone" that might prove the Administrator's point. Cross-Pet. Br. 39. But even more important, the Criteria Document provision, section 108(a)(2)(C), directs EPA to *include* information relating to "any known or anticipated effects on *welfare*," thus expressly taking the criteria beyond medical science to "effects on economic values and on personal comfort and well-being." CAA §§ 108(a)(2)(C), 302(h), 42 U.S.C. § 7408(a)(2)(C), 7602(h) (emphasis added). On this point, the Administrator simply has no response to the arguments set out in our opening brief. *Compare* Cross-Pet. Br. 38. To be sure, as Massachusetts points out, Congress did indeed require EPA to promulgate revised NAAQS within 30 days of the effective date of the 1970 Amendments, thereby recognizing that the Agency would have to use the pre-existing criteria documents (which, unlike the documents to be compiled after 1970, contained only science data). *See* Mass. Br. 18. But that reflects only the 1970 Congress' desire for immediate promulgation of nationwide standards based on cost information readily at hand, whether or not it was contained in the criteria. This expedient fact does not alter the types of public health information that Congress required for *subsequent* criteria documents, which Congress directed EPA to revise "from time to time thereafter." CAA § 108(a)(1), 42 U.S.C. § 7408(a)(1).

Nor are the Administrator's other arguments any more persuasive. EPA Resp. 38-39. Contrary to her claims, Congress' rejection of feasibility as the basis for setting NAAQS hardly makes the cost information contained in the section 108(b)(1) documents irrelevant to the Administrator's public health standard-setting determinations. Indeed, the relevance of this cost information is underscored by Congress' directive that the section 108(b)(1) document be made available "simultaneously" with the criteria and well in advance of setting the NAAQS. *See* Cross-Pet. Br. 40. Finally, the Administrator tries to limit the role of the CASAC advisory provision (CAA § 109(d)(2)(C), 42 U.S.C. § 7409(d)(2)(C)) to

"implementation." EPA Resp. 39. But, as explained in our opening brief, section 109(d) is concerned with NAAQS standard-setting (not implementation), and in that connection, Congress specifically directed CASAC to advise *the Administrator* (the official responsible for NAAQS standard-setting) on certain "social, economic, or energy effects" that are relevant to public health determinations under section 109(b). *See* Cross-Pet. Br. 41.

The Administrator's remaining argument—namely, that Congress "preserv[ed] the ability of EPA and the States to consider costs and feasibility in the implementation stage," EPA Resp. 24-25—ignores this Court's *Cotton Dust* decision and badly misstates the holding of *Union Electric*. In the OSH Act (also enacted in 1970), Congress confronted a problem similar in certain respects to that which it confronted in the 1970 Clean Air Amendments. Should it require OSHA to set industry-specific toxic substance workplace standards on the basis of "feasibility," or "cost-benefit analysis"? *See Cotton Dust*, 452 U.S. at 508-513. As the Court held, Congress chose "feasibility," necessarily ruling out "cost-benefit analysis." *Id.* at 509. For reasons already explained, *see* pp. 8-14, *supra*, Congress made precisely the opposite choice in the 1970 Clean Air Amendments—selecting public health standards that would balance competing considerations, albeit with an added admonition that the Administrator also provide "an adequate margin of safety."

The thrust of the Administrator's argument in this case is that Congress ruled out *both* feasibility *and* cost-benefit analysis when it enacted CAA section 109(b). That extreme contention lies at the heart of both the nondelegation problem identified by the lower court and the Administrator's inherently implausible claim that science alone can decide public policy questions. But even *Union Electric*, the case on which the Administrator relies most heavily, does not remotely support such a position. That decision never mentions cost-benefit analysis, much less does it explicate the public health basis for setting NAAQS. Rather,

Union Electric could not be clearer that it dealt only with "technological and economic infeasibility," 427 U.S. at 265—a concept that the Court held EPA could *not* consider even during the implementation stage. Under *Union Electric*, these factors can indeed be considered by States, but only in the limited sense that States may entertain applications for "special treatment" for any source "[s]o long as the national standards are met." *Id.* at 266.

The concept of a feasibility test also explains the CAA provisions that the Administrator would contrast with section 109(b). *See* EPA Resp. 20 n.13. In particular, the new source performance standards (CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1)), motor vehicle emission standards (CAA § 202(a)(2), 42 U.S.C. § 7521(a)(2)), and aircraft emission standards (CAA § 231(b), 42 U.S.C. § 7571(b)) cited by the Administrator are all "feasibility" standards within the meaning of *Cotton Dust*. The various cost-consideration directives in those contexts therefore do not create any inference that Congress would also have wanted to further define the role of costs in the much different context of section 109(b), which calls for standards set to protect the public health as traditionally defined.

The post-1970 legislative history on which the Administrator also relies heavily, *see id.* at 27-31, carries "very little, if any, significance." *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (internal quotation omitted); *Blanchette v. Connecticut Gen.*, 419 U.S. 102, 132 (1974). But, not surprisingly, that post-enactment legislative history supports our interpretation at least as much as the Administrator's. *See, e.g.*, H.R. Rep. No. 95-294 at 127 (1977) (Administrator must consider "economic and social consequences" in NAAQS standard-setting).

The Administrator's final gasp amounts to an argument that Congress somehow ratified her interpretation in the various Clean Air Amendments after 1970. *See* EPA Resp. 27-31. The

Administrator's argument in this respect necessarily turns on legislative *inaction* since Congress has never amended the 1970 text of section 109(b) or the relevant provisions of section 108. But "inaction" is "a particularly dangerous ground on which to rest an interpretation of a prior statute," "because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotations omitted). This Court's recent decision in *FDA v. Brown & Williamson Tobacco Corp.* is not to the contrary because in that case Congress actually had enacted legislation that conflicted with FDA's interpretation of the Act. *See* 120 S. Ct. at 1306. Here, by contrast, "the statutory changes adopted [outside of section 109(b)] are entirely consistent with our interpretation," and thus "do[] not modify the plain terms of [the Act]." *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 615-16 (1981); *accord Aaron v. SEC*, 446 U.S. 680, 695 n.11 (1980).

Finally, it is worth noting that the Administrator's constructions of "public health" and "welfare" are internally self-contradictory. Specifically, the Administrator would limit relevant "welfare" effects under the Act's section 307(h), 42 U.S.C. § 7607(h), to effects caused by "exposure to air pollutants," as opposed to "the effect of measures to implement the NAAQS." EPA Resp. 37. But under that formulation, the Administrator would be compelled to abate pollution that causes "economic" damage, even in circumstances where the cost of abatement greatly exceeds the "economic values" the NAAQS are designed to protect.

An analogous contradiction inheres in the Administrator's proffered definition of "public health." Excluding consideration of costs can produce "such large reductions in income that lives are lost on net." *See* Richard J. Zeckhauser & W. Kip Viscusi, *The Risk Management Dilemma*, 545 Annals Am. Acad. Pol. & Soc. Sci. 144, 149 & n.6 (1996); *see also* AEI-Brookings *Amici*

Br. 2 & n.2 (better allocation of health resources would result either in "savings of $31.1 billion from current cost levels with no additional loss of life or savings of 60,200 lives at current cost levels").

III. *STARE DECISIS* DOES NOT APPLY IN THIS CASE.

While the Administrator never expressly argues that *Lead Industries* should have *stare decisis* effect, certain of her supporters do make that argument. *See, e.g.*, Environmental Defense *Amici* Br. 16-19. *Lead Industries* is, however, a particularly inappropriate basis for application of the *stare decisis* principle.

First, as suggested in our opening brief, there are valid reasons to suspect that EPA Administrators may actually have considered competing factors including costs in setting previous NAAQS—and perhaps even in setting the ozone and PM standards under review here. *See* Cross-Pet. Br. 43-45. The various *amici curiae* briefs have provided additional support both for the fact that this has occurred as well as added reasons why transparency in the NAAQS standard-setting process is so essential. *See* Marchant *Amici* Br. in No. 99-1257, at 12-15; AEI-Brookings *Amici* Br. 12; David L. Faigman, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW 187 (1999) ("real loser in the PM/ozone drama was candor"). Giving *stare decisis* effect to *Lead Industries* under these circumstances would effectively license the Administrator to shield her decisionmaking process from public and judicial scrutiny in violation of this Court's decisions. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

Second, our opening brief also shows that in other cases EPA has sought—and the D.C. Circuit has granted—authority for the Agency to consider competing factors including costs under other CAA provisions comparable to section 109(b). *See* Cross-Pet. Br. 45-47. Certain parties have misportrayed this discussion as advocating a construction canon holding that costs

must be considered unless such consideration is expressly precluded. *See, e.g.*, Mass. Resp. 40. That was not our intent.

Certainly it is true that *State of Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), and similar cases would support such a canon. But the Court need not go so far here. *See* ATA Resp. in No. 99-1257, at 24 (noting that the Court could, but need not in this case, engage in "aggressive judicial construction"). Rather, the point is that the Administrator must be consistent. She cannot argue here that costs cannot be considered because Congress "has *indicated expressly* when and to what extent costs and implementation effects *should* be considered in the NAAQS regulatory process," *id.* at 19 (emphasis added)—and then simultaneously defend in *State of Michigan* her contrary position that costs were relevant there because the Act provided "no evidence of congressional intent to *exclude* costs," *id.* at 41 n.33 (emphasis added). In sum, *State of Michigan* and similar D.C. Circuit Clean Air Act decisions testify eloquently to *Lead Industries*' frail status as a circuit precedent, *see* Cross-Pet. Br. 27, and provide yet additional grounds for not giving *stare decisis* effect to that decision.

This Court's *certiorari* jurisdiction provides the final, and ultimately conclusive, answer to the bid to give *stare decisis* effect to *Lead Industries*. The denial of *certiorari*, of course, "imparts *no* implication or inference concerning the Court's view of the merits." *See, e.g., Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973) (emphasis added). As a logical matter, then, *stare decisis* cannot apply here without creating far more than an "implication" concerning the merits of cases like this one, where *certiorari* has previously been denied on issues for which a circuit conflict is highly unlikely.

CONCLUSION

For the foregoing reasons, the Court should grant the relief requested in our cross-petitioners brief.

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Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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AMENDED DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the following list amends the corporate disclosure statement filed in the Brief for Respondents Appalachian Power Co., *et al.*, In Support of Petitioners on July 20, 2000.

Baltimore Gas and Electric Co.
(now referred to as Constellation Power Source Generation, Inc.)
Carolina Power & Light Co.
(a subsidiary of CP&L Energy, Inc.)
(State Street Bank & Trust Company Boston is no longer a 10% or greater owner)
Illinois Power Co.
(a subsidiary of Dynegy, Inc.)
PacifiCorp
(a subsidiary of Scottish Power plc)

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GLOSSARY

The following is a glossary of acronyms and abbreviations used in this brief.

Act	Clean Air Act
Administrator	Administrator of the United States Environmental Protection Agency
Agency	United States Environmental Protection Agency
App.	Appendix to Brief for Respondents Appalachian Power Company, *et al.*, in Support of Petitioners (99-1426)
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
OJA	Joint Appendix in D.C. Cir. Case No. 97-1441
OSP	Ozone Staff Paper (1996)

PM	Particulate Matter
PM_{10}	Particulate Matter with an aerodynamic diameter less than or equal to 10 microns
$PM_{2.5}$	Particulate Matter with an aerodynamic diameter less than or equal to 2.5 microns
PMJA	Joint Appendix in D.C. Cir. Case No. 97-1440
PPM	Parts Per Million
Reply App.	Appendix to Reply Brief of Appalachian Power Company, *et al.* (99-1426)
RIA	Regulatory Impact Analyses

INTRODUCTION[1]

EPA and its supporters assert that a federal agency directed by Congress to protect the public health *must* blind itself to factors showing that its decisions *would not* benefit the public. This Court should reject EPA's remarkable abandonment of the mission given it by Congress.

Appalachian Power Co., *et al.* ("APC") do *not* question that EPA may regulate to protect the "public health" when confronted with uncertain science. Rather APC asks this Court to address whether the Clean Air Act ("CAA") constrains EPA's exercise of policy judgment to manage uncertain public health risks and, if so, what are the constraints. This question is critically important because if Congress has provided no legal standards to guide how EPA manages such risks, then § 109 is an unconstitutional delegation of lawmaking power.

In order to answer this question, it is necessary to understand the nature of the regulatory action required under the NAAQS program. For most air pollutants, as for those at issue here, science has not identified a threshold below which health effects might not be *predicted* to occur.[2] In other words, unless there is a proven threshold below which there are no demonstrated effects from a pollutant, EPA *assumes*

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[1] This brief is filed in support of American Trucking Ass'ns, *et al.*

[2] *See, e.g.*, *Air Pollution—1970: Hearings on S. 3229, S. 3466, S. 3546, Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Pub. Works*, 91st Cong., pt. 4, at 1489 (1970) [hereinafter *1970 Hrg.*], *reprinted in* 2 Sen. Comm. on Pub. Works, *A Legislative History of the Clean Air Amendments of 1970*, at 1184 (Comm. Print 1974) [hereinafter *1970 Legis. Hist.*] (testimony of Dr. Middleton) ("To identify a no-known-effects level is . . . very likely not possible."); H.R. Rep. No. 95-294, at 127 (1977), *reprinted in* 4 Sen. Comm. on Env't and Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1977*, at 2594 (Comm. Print 1978) [hereinafter *1977 Legis. Hist.*].

effects will become fewer, but continue, down to a "zero" concentration level.

As a result, with large populations, an assessment of health risk will always predict effects, even when concentrations of a pollutant approach or fall below naturally occurring background concentrations.[3] This is a "potential" health risk driven by an assumption that, because science cannot prove a threshold, *no threshold exists*. In circumstances of ever-diminishing risk of harm, agencies must exercise "risk management" judgment unless the statute calls for elimination of all potential health risk.[4]

In §§ 108 and 109 of the Act, Congress directed EPA to regulate where pollution "endanger[s]" public health, CAA § 108(a)(1), and then to set air quality standards that are "requisite" to protect "public health," allowing an "adequate margin of safety." CAA § 109(b)(1). This is not a "zero risk" mandate. Rather, in exercising its § 109 regulatory authority, EPA must make two types of policy judgments. First, it must determine what level of predicted health risk

[3] In this case, for example, EPA's science advisers recognized that the level of the revised ozone NAAQS (0.08 ppm) approaches background concentrations in pristine areas. Clean Air Scientific Advisory Committee ("CASAC") Tr. (3/22/95) 296, OJA 278; EPA, *Review of the National Ambient Air Quality Standards for Ozone* 20 (1996) [hereinafter *OSP*], OJA 1830 (noting annual average hourly values at "clean" sites may be 0.075 ppm). Yet, EPA's risk assessment predicts health effects at levels as low as 0.04 ppm. *Id.* 116, OJA 1926.

[4] *See* Science Advisory Board, EPA, *Toward Integrated Environmental Decisionmaking* 13 (August 2000) [hereinafter SAB] (Risk management involves selection of a preferred option after "explicit consideration of the trade-offs involved . . . ."), Reply App. 9a; NAS/NRC, *Risk Assessment in the Federal Government: Managing the Process* 18-19 (1983) (describing risk assessment as "characterization of the potential adverse health effects of human exposures" and risk management as "the process of evaluating alternative regulatory actions and selecting among them"), Reply App. 6a-7a.

constitutes a potential "public health" problem (i.e., what level presents a "significant" adverse public health risk).

Second, EPA must determine what regulatory response is "requisite" to address that potential public health problem, allowing an "adequate" margin of safety. As described by Congress, in defining an "adequate" margin of safety, EPA must provide a "reasonable degree of protection" in response to scientific uncertainty. S. Rep. No. 91-1196, at 10 (1970), *reprinted in* 1 *1970 Legis. Hist., supra* note 2, at 410, OJA 3687; *see* EPA Br. (99-1426), at 33.

EPA argues strenuously that CAA § 109 "unambiguously" requires that primary air quality standards be based *solely* on the direct inhalation health effects of a pollutant, regardless of other considerations. EPA Br. (99-1426), at 18, 19. But if this were true, how does EPA determine what constitutes a potential "public health" problem? Is 50,000 predicted coughs in a population of fifty million a public health problem? Is it twice that amount, or one-half that amount? How are uncertainties inherent in such predictions to be accounted for in determining whether predicted effects might constitute a potential "public health" problem?

Once EPA determines that there is a significant adverse public health risk, how does EPA determine a "reasonable degree of protection" (i.e., an "adequate" margin of safety) in response to that problem? Does a standard that is predicted to reduce that risk in the affected population by 10 percent (or 2 percent or 20 percent) afford a "reasonable degree of protection" for the "public health"? And what if there is great uncertainty whether the "sensitive population" actually experiences the effect? What if the revised standard is predicted to deprive those with lower earnings of affordable electricity, affordable health care, or affordable heating fuel, thereby imposing adverse health and welfare consequences?[5]

[5] *See Union Elec. Co. v. EPA*, 427 U.S. 246, 271-72 (1976) (Powell, J., concurring).

Finally, what if the Administrator's science advisers conclude there is no significant difference in potential public health protection afforded by existing and revised standards, but the revised standard will impose additional costs on society of $9 billion annually with associated adverse public health risks flowing from those costs?

These are questions that can be addressed in a manner that promotes the "public health" only after considering the potential adverse impacts of the proposed regulatory action. For the reasons discussed below, and contrary to the court of appeals holding based on *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), Congress did *not* prohibit EPA from considering factors essential to the exercise of sound judgment in making NAAQS decisions that require the management of uncertain health risks.

ARGUMENT

In its brief, EPA claims that the Court need not look at the record, EPA Br. (99-1426), at 8, but then argues that the record shows that the NAAQS decisions here were *not* the product of risk management judgment. According to EPA, its decisions were based on "real and significant effects, not merely hypothetical risks." *Id.* 8, 10.

Both courts and commentators have counseled caution where agencies attempt to disguise policy judgment as science, and EPA's argument here presents a striking example of this problem. EPA's claim that the Administrator's decision was driven by demonstrated effects, not risk predictions, is both implausible and inconsistent with the record. More fundamentally, EPA's argument fails to appreciate the difference between a *demonstrated public health effect* (e.g., "asthma") and a *predicted cause of that effect* (e.g., a particular type and level of pollution), which requires judgment as to how to manage uncertain risks.

Based on *Lead Industries*, the lower court held that the Administrator had no authority to consider the impacts of her

decision on society in exercising judgment as to whether predicted health risk requires regulation as a potential public health problem and, if so, what is a "reasonable degree of protection" in response. 175 F.3d 1027, 1040-41; App. 18a-21a. For the following reasons, the CAA does not constrain the Administrator's authority in that fashion, and the court of appeals holding to the contrary in this case and in *Lead Industries* must be overruled.

I. EPA BASED ITS NAAQS DECISIONS ON RISK PREDICTIONS, WITHOUT DEFINING ANY PRINCIPLE FOR DETERMINING HOW MUCH RISK IS ACCEPTABLE.

These rulemakings addressed the potential risk of harm, not demonstrated health effects. As EPA explains, the rulemaking records for the NAAQS included new studies not considered in prior standard reviews. EPA Br. (99-1426), at 10. These studies, however, addressed the same types of health effects that EPA has long considered when regulating these pollutants. For ozone, for example, these include predicted respiratory symptoms (e.g., coughs) and physiological changes (e.g., changes in airway resistance).[6] For PM, they include predicted excess mortality, bronchitis, lung function and symptom responses.[7]

Reflecting this science, EPA's exposure and risk analyses for ozone addressed the *same* health effects for all of the standards under consideration, including the existing 1-hour standard.[8] And, EPA concluded that these health effects could be addressed by *either* a 1-hour or 8-hour standard.[9]

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[6] *Compare* 44 Fed. Reg. 8215-16, OJA 3493-94, *with* 62 Fed. Reg. 38864-65, OJA 9-10.

[7] *Compare* 52 Fed. Reg. 25641-44, PMJA 215-18, *with* 62 Fed. Reg. 38676, PMJA 26.

[8] *See OSP, supra* note 3, at 86, 123-24, 128, OJA 1896, 1933-34, 1938.

[9] 62 Fed. Reg. 38861, OJA 6.

Furthermore, as EPA observes, "CASAC clearly understood" that the ozone record "showed a continuum of risk," with statistically significant decreases in risk for more stringent standards. EPA Br. (99-1426), at 12. Nevertheless, CASAC *disagreed* with EPA's assertion that these decreases in risk also reflected "corresponding increases in public health protection." *Id.*[10]

Instead, CASAC concluded, the science does not allow one to "distinguish[] any of the proposed [ozone] standards . . . as being significantly more protective of public health."[11] While EPA claims that CASAC meant only that ozone is a non-threshold pollutant, EPA Br. (99-1426), at 11-12, EPA is wrong. CASAC explained that it reached its conclusion because "the difference in percent of outdoor children [the sensitive population] . . . responding [to ozone] between the present [i.e., 1-hour] standard and the most stringent proposal are small and their ranges overlap for *all* health endpoints." *Id.* Even the EPA staff observed that an 8-hour standard equivalent to the existing ozone standard provided some "margin of safety" for these ozone-related health risks.[12]

As a result, CASAC concluded that any decision on ozone NAAQS revision would be driven *not* by science, but by "policy judgment."[13] In other words, because the current standards provide a "margin of safety," the Administrator would have to determine that the existing "margin" was not "adequate" and some other "margin" was.

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[10] *Compare* Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner 3 (Nov. 30, 1995) [hereinafter CASAC Ozone Letter], OJA 238, *with* EPA Br. (99-1426), at 12.

[11] CASAC Ozone Letter, *supra* note 10, at 3, OJA 238.

[12] *OSP*, *supra* note 3, at 167, OJA 1977; 62 Fed. Reg. 38858, OJA 3.

[13] CASAC Ozone Letter, *supra* note 10, at 3, OJA 238; *see also* Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner 4 (June 13, 1996) [hereinafter CASAC PM Letter], PMJA 3164.

For PM, EPA "concluded that the available evidence 'provide[s] ample reason to be concerned that there are detectable human health effects attributable to PM at levels *below* the current NAAQS.'" EPA Br. (99-1426), at 10 n.6.[14] But a "concern[]" that there may be health effects below a given level does not by itself establish a "public health" problem. Nor does it establish what regulatory response will provide a "reasonable degree of protection" for that problem.

Thus, while CASAC concluded that the PM_{10} NAAQS should be revised, it also observed that there remained "many unanswered questions and uncertainties associated with establishing causality" of health effects by $PM_{2.5}$, which prevented *any* consensus on what $PM_{2.5}$ standard would be necessary (i.e., "requisite") to protect public health.[15] CASAC therefore concluded that the decision on PM

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[14] CASAC agreed that the Criteria Document from which the statement is drawn would, after revision, provide "an adequate scientific basis for regulatory decisions on PM," *see* Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner 3 (Mar. 15, 1996), PMJA 3151, but did not endorse *any* specific statements such as this one. *Clean Air Act: Ozone and Particulate Matter Standards: Hearings Before the Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety and the Sen. Comm. on Env't and Pub. Works*, 105th Cong., pt. 1, at 104 (1997) (Responses by Dr. Wolff).

[15] CASAC PM Letter, *supra* note 13, at 2-3, PMJA 3162-63. EPA characterizes its PM standards as "toward the mid-portion of the range of protection afforded by . . . the CASAC panel members who chose to express individual views." EPA Br. (99-1426), at 11 n.7. In fact, CASAC did not endorse the EPA Staff's recommended ranges for $PM_{2.5}$ standards, *see* CASAC PM Letter, *supra* note 13, at 2, 5, PMJA 3162, 3165, and thirteen CASAC panel members recommended either *no* annual standard or one *less* stringent than the one adopted by EPA as the controlling standard (including five who favored a standard higher than the top of EPA's range). *Id.* 5-6, PMJA 3165-66. Only two of the 21 panel members supported an annual standard as stringent as the one EPA adopted. *Id.*

standard revision required "policy" judgment by the Administrator to address a potential public health problem.[16]

The Administrator confirmed that her decisions here called for "policy" judgment.[17] This policy judgment addressed whether more "margin of safety" was appropriate in response to uncertain health risks, which the Administrator explained "may not be amenable to quantification in terms of what . . . is 'acceptable' or any other metric."[18] While EPA would now like to avoid discussing how it exercises risk management judgment in the face of uncertain science regarding the cause of a predicted health effect, the nature of EPA's risk management authority in revising NAAQS, therefore, is the critical issue in this case.

II. THE CLEAN AIR ACT PROVIDES GUIDANCE FOR PUBLIC HEALTH RISK MANAGEMENT JUDGMENT.

EPA argues that the language of § 109 "unambiguously" requires it to base NAAQS decisions "*solely* on the health and welfare effects" of the pollutant, and not on "other considerations." EPA Br. (99-1426), at 14, 18, 19. To the contrary, EPA's response brief, as well as the statute's language, legislative history, and purposes, confirm that Congress did not tell EPA to ignore the consequences of its public health policy decisions.

A. The Language of Section 109

EPA argues that "[s]ection 109's command that NAAQS be set at levels 'requisite' to protect public health and welfare unambiguously directs that the levels be set to achieve *that objective* . . . ." EPA Br. (99-1426), at 19 (emphasis added). But this tells us nothing, for the "objective" to which EPA

[16] *Id.* 4, PMJA 3164.

[17] 62 Fed. Reg. 38857, 38859, 38861, 38862, 38863, 38867, OJA 2, 4, 6, 7, 8, 12; *id.* 38653, 38668, 38669, 38671, 38672, PMJA 3, 18, 19, 21, 22.

[18] 62 Fed. Reg. 38883, OJA 28; *id.* 38688, PMJA 38.

refers is protecting the "public health." While EPA asserts elsewhere that it regulates in response to a "risk of adverse effects" or "medically significant risks," EPA Br. (99-1426), at 14, 33, EPA never explains what standards guide its "public health" decisions when confronted with, at most, a *potential* public health risk.

For example, in the case of ozone, a cough or a tightening of the chest on inhalation (a symptom one might experience by stepping out-of-doors on a cold morning) was observed during prolonged exercise under controlled laboratory conditions.[19] Based on these studies, EPA *predicted* that coughs would occur in a population (exercising children) that did *not* experience these symptoms when studied.[20] Furthermore, EPA's risk assessment predicted, based on a no-threshold assumption, that such *undemonstrated* effects would occur at levels below the lowest level tested in the controlled studies (i.e., below 0.08 ppm).[21]

EPA concedes that the statutory "public health" language requires that it focus on the "'health of the community at large.'" EPA Br. (99-1426), at 36 n.28. But how severe, how frequent or how certain must the *risk of an effect* be before it constitutes a potential "adverse" *public health* effect? The "endangerment" standard of the statute requires

[19] *See OSP*, *supra* note 3, at 28, 107-110, OJA 1838, 1917-20.

[20] *Id.* 55, OJA 1865 ("[C]hildren respond [functionally] to low-level [ozone] . . . albeit without symptoms [e.g., coughs].").

[21] *See* CASAC Tr. (9/19/95) 109, OJA 298 (noting exposures between 0.06 ppm and 0.08 ppm contribute the most risk); EPA Br. (99-1257), at 13-14. In the case of $PM_{2.5}$, EPA's risk assessment assumed a causal association between $PM_{2.5}$ and effects to "background" levels of PM. EPA, *Review of the National Ambient Air Quality Standards for Particulate Matter* VI-1, VI-3 (1996), PMJA 2051, 2053. The Agency acknowledges, however, that both the causal mechanism and the existence of an effects threshold are unknown. *See* 62 Fed. Reg. 38657, 38664-65, PMJA 7, 14-15.

that EPA make a policy judgment as to what constitutes a "significant risk" to public health.[22] This policy judgment requires EPA to address explicitly the uncertainties inherent in its risk predictions and then to put those predictions in context, for example, of the risks federal agencies or the public have found acceptable, and of the public health risks that might be increased by regulation.[23]

Once it has articulated its basis for concluding that there is a potential public health problem (which EPA failed to do here), EPA may then set a standard at a level "requisite to protect" the public health, allowing an "adequate margin of safety." As EPA explained *after* the lower court's decision, the "requisite to protect" standard of § 109(b) contemplates air quality standards that are "neither more nor less stringent than necessary" to protect the public health.[24]

Even if this were EPA's position on remand,[25] how does EPA select an option that is neither more nor less stringent than "necessary" to protect "public health" where risk management options reflect similar levels of health

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[22] *See* H.R. Rep. No. 95-294, at 3, 48-49, *reprinted in* 4 *1977 Legis. Hist.*, *supra* note 2, at 2470, 2515-16; APC Br. (99-1426), at 37 n.87; ALA Br. (99-1257), at 20-21.

[23] *See* APC Br. (99-1426), at 30-32; GE Br. (99-1426), at 22-25; Mfrs. Alliance/MAPI, *et al.*, Br. (99-1257), at 15-20; 1 Presidential/ Congressional Comm'n on Risk Assessment and Risk Management, *Framework for Environmental Health Risk Management* 5, 35 (1997) (Risk management requires putting problems into real world context and considering "the potential . . . to increase one type of risk while reducing the risk of concern."), Reply App. 5a.

[24] *See* 195 F.3d at 6, App. 71a; *cf. Union Elec.*, 427 U.S. at 263 ("[T]he most natural reading of the 'as may be necessary' phrase in context is simply that the Administrator must assure that the minimal, or 'necessary,' requirements are met . . . .").

[25] EPA's proffered "intelligible principle" at rehearing was, of course, a post hoc rationalization that only confirms the correctness of the lower court's decision. *See* APC Br. (99-1257), at 26 n.60.

protection (as in the case of ozone)?[26] When a pollutant is associated with but not necessarily *the cause* of the effect (as with $PM_{2.5}$), how can EPA identify the NAAQS that is no more stringent than "necessary" to protect "public health"?[27]

As risk becomes more certain and differences between risk management options more apparent, more health protection may be "necessary." Where uncertainty is large and differences in risk small, a different judgment might result. In either case, what is necessary to protect the public health depends on an evaluation of whether marginal reductions in predicted risk are worth the collateral adverse health, environmental or economic costs of those reductions.

Congress also emphasized that the "adequate margin of safety" language of § 109 is intended to provide a "reasonable degree of protection" in response to uncertain science and unknown hazards.[28] Providing a "reasonable" degree of protection contemplates more than tallying predictions of uncertain health effects.[29] As this Court has

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[26] For example, is a revised ozone NAAQS that imposes an estimated $9.6 billion in annual costs on society *on top of the cost of attaining the 1-hour standard*, *see* EPA, *Regulatory Impact Analyses for Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12 (1997) [hereinafter *RIA*], OJA 2919, for no significant improvement in public health protection, "requisite" to protect "public health"?

[27] For example, is a revised NAAQS that is estimated to cause between 1,600 and 27,000 premature deaths, *see* APC Br. (99-1426), at 18, while preventing 3,700 to 16,600 predicted premature deaths (based on an uncertain, "assumed" causal relationship), *RIA*, *supra* note 26, at ES-18, OJA 2925, "requisite" to protect the "public health"?

[28] S. Rep. No. 91-1196, at 10, *reprinted* in 1 *1970 Legis. Hist.*, *supra* note 2, at 410, OJA 3687; *see also* EPA Br. (99-1426), at 33-34 (describing margin of safety requirement in terms of a "reasonable degree of protection"); Mass/NJ Br. (99-1426), at 21 n.39.

[29] *See* SAB, *supra* note 4, at 14, 20 ("[T]echnical risk rankings, in isolation, offer[] insufficient guidance for policy decisions." What is needed is "open and comprehensive examination of environmental

observed, the concept of reasonableness contemplates a "balancing of costs and benefits."[30]

Finally, where there is a NAAQS in place, and the States have put in place (or are putting in place) a program to meet that standard, EPA must determine whether a change in its earlier NAAQS risk management decision is "appropriate" in light of new information.[31] EPA argues that § 109(d)'s requirement that the Administrator revise NAAQS "*as may be appropriate* in accordance with [§§ 108 and 109(b)]" (emphasis added) adds nothing to § 109(b)'s requirement that NAAQS be set at levels "requisite" to protect "public health" with an "adequate margin of safety."

But whether additional "margin of safety" is an "appropriate" response to uncertain risk, or whether existing control programs should remain in place while additional scientific investigations are completed, can be resolved only based on the advice that CASAC must give to "the Administrator" (*not* the States) on the need for and adverse impacts of standard revision. CAA § 109(d)(2). Only with that information can the Administrator determine whether standard revisions are "appropriate." To ignore this

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problems."); *cf. Chemical Mfrs. Ass'n v. EPA*, 899 F.2d 344, 359 (5th Cir. 1990) ("[Q]uantity . . . without more, is . . . of little help in understanding what is meant by 'substantial.'").

[30] *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510 n.30 (1981); *see also Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1222 (5th Cir. 1991) (citing *Forester v. CPSC*, 559 F.2d 774, 789 (D.C. Cir. 1977)); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 642 (D.C. Cir. 1973) (Regulation in the face of uncertainty requires weighing the "nature and consequences of risk of error."). Indeed, the D.C. Circuit has acknowledged such balancing by EPA when setting standards to protect the public health with an "ample margin of safety." *See NRDC v. EPA* ("*Vinyl Chloride*"), 824 F.2d 1146, 1165 (D.C. Cir. 1987) (*en banc*).

[31] This is an especially important question here, in light of the *statutory* program for ozone reductions that would be disrupted by EPA's standard revision. APC Br. (99-1257), at 42-50.

information, as EPA and its supporters urge, could result in decisions that disrupt control programs under an existing NAAQS with no significant improvement in (or perhaps reduction in) public health protection. *See* APC Br. (99-1257), at 47-48.

B. The Structure of the Act and Its Legislative History

Section 109(b)(1) requires that NAAQS be "based on" the air quality "criteria" document that EPA issues under § 108. *See* EPA Br. (99-1426), at 19. The § 108 criteria document is to contain scientific information on the effects "which may be expected to result from the presence of such pollutant in the ambient air." CAA§ 108(a)(2). Based on this language of §§ 108 and 109, EPA argues that it is precluded, in setting NAAQS, from considering factors *not* addressed in the criteria document. EPA Br. (99-1426), at 19.

As EPA and its supporters explain, however, the criteria are "*descriptive*; that is, they describe the *effects that have been observed* to occur when the ambient air level of a pollutant has reached or exceeded specific figures . . . ."[32] The criteria in fact "stress[] the *difficulties* of drawing a bright line between pollution that is harmful and pollution that is not."[33]

In revising NAAQS, however, the Administrator must exercise judgment in light of uncertain risk predictions. The words "based on" in § 109(b) therefore cannot suggest that the information in the § 108 criteria document is the exclusive record upon which NAAQS may be based. Rather, consistent with their plain meaning,[34] the words "based on"

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[32] CBT Br. (99-1426), at 21 (emphasis added) (citations omitted); *see* Mass/NJ Br. (99-1426), at 18-19; EPA Br. (99-1426), at 24.

[33] Mass/NJ Br. (99-1426), at 9 (emphasis added); *see id.* 20 ("air quality criteria cannot be interpreted as threshold values").

[34] *See* 1 *The New Shorter Oxford English Dictionary* 187 (1993) ("act as a foundation for").

merely call for consideration of the information in the criteria document in determining what potential risks should be regulated, and to what level.

Indeed, if the language in § 109(b) means that standards must be "based on" the criteria document *exclusively*, there would be no need for notice and comment rulemaking on the standard. Under EPA's interpretation, all the Administrator would have to do is announce a NAAQS "based on" the criteria document and go home. CASAC advice, necessary information not included in the criteria document (e.g., EPA and others' risk and exposure analyses, and EPA's "staff paper"), and public comments would be irrelevant.

EPA next turns to the legislative history, arguing that it confirms that "Congress made a policy choice [in 1970] not to base NAAQS on consideration of the technological feasibility or cost-effectiveness of pollution control measures." EPA Br. (99-1426), at 21. But all this legislative history shows is that Congress, in § 110 of the Act, (1) authorized the States in 1970 to consider cost and feasibility of pollution controls in implementing the NAAQS, so long as the State's "control strategy" program would bring about timely attainment of the NAAQS, and (2) prohibited EPA from overriding the State's control program on cost or feasibility grounds. *See id.* at 20.

This says *nothing* about what EPA is required to consider, or prohibited from considering, when exercising judgment under § 109 on how potential public health risks should be managed in setting NAAQS. Indeed, because EPA claims it is prohibited from considering cost and feasibility at the implementation stage, and because States may often have to ignore these factors to achieve expeditious attainment, unless EPA's public health policy judgment under § 109 reflects consideration of the overall societal impacts, those impacts

might never be considered. *See* Ohio, *et al.*, Br. (99-1426), at 9.[35]

EPA also argues that the legislative history shows that Congress made "a deliberate policy judgment that the NAAQS would have a 'technology-forcing character.'" EPA Br. (99-1426), at 25, *quoting Union Elec. Co.*, 427 U.S. at 257. The *Union Electric* Court observed, however, that the NAAQS program is "technology forcing" because, under § 110(a), States must develop programs to attain the NAAQS in three years or sooner *regardless* of cost or feasibility. *See* 427 U.S. at 258. As the Court noted, "so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments." *Id.* at 257; *see also id.* at 261.[36]

Union Electric therefore does *not* say that EPA must ignore real world impacts when evaluating risk management options under § 109.[37] Nevertheless, further developing its

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[35] The records here indicate that EPA could *not* identify technologically feasible measures for attaining these NAAQS. *RIA*, *supra* note 26, at ES-11 to ES-12, OJA 2918-19. When EPA *assumed* the existence of cost-effective measures to bring about national attainment, contrary to EPA's characterization of the RIA, EPA Br. (99-1426), at 46 n.41, costs exceeded the quantifiable benefits of the ozone NAAQS while the range of quantifiable benefits for the PM NAAQS fell within the estimated cost range. *RIA*, *supra* note 26, at ES-20, OJA 2927. Historically, EPA has sometimes overestimated and sometimes underestimated control costs, although accuracy has improved over time. *See* Winston Harrington, *et al.*, *On the Accuracy of Regulatory Cost Estimates*, 19 J. Pol. Analysis & Mgmt. 297, 307, 309 (2000).

[36] *See NRDC v. Train*, 421 U.S. 60, 91 (1975) (The NAAQS program is "technology forcing if the NAAQS adopted requires this result.").

[37] Similarly, Congress' statement in 1990 that primary NAAQS are to protect the public health "without regard to the economic or technical feasibility of attainment," EPA Br. (99-1426), at 30 (citation omitted), must be understood, if relevant at all, *see* APC Br. (99-1426), at 48-49; Inhofe, *et al.*, Br. (99-1426), at 17-30, as a reaffirmation that once EPA sets a NAAQS, that NAAQS must be met.

§ 110 *non sequitur*, EPA argues that Congress has changed § 110 attainment deadlines, and asserts that this confirms that EPA must ignore the consequences of its § 109 NAAQS decisions. EPA Br. (99-1426), at 27-30.

That Congress has acted to give States more flexibility in implementing NAAQS under § 110 says nothing about how EPA sets the NAAQS under § 109. To the contrary, that Congress in 1990 enacted a comprehensive ozone risk management program in Subpart 2, CAA §§ 181-185A, shows that Congress decided to override EPA's failed ozone risk management program and, in so doing, to preclude EPA from establishing a more stringent ozone NAAQS.[38]

Regarding whether and how the Act constrains EPA's authority to manage potential public health risks, the legislative history tells a different story than that told by EPA. Congress in 1970 adopted statutory language to protect the "public health" as opposed to "the health . . . of any persons."[39] At the same time, Congress understood that EPA would have to draw a line "between the point of no known effects and the maximum effects."[40] Congress therefore authorized EPA to regulate in response to "significant" public health risk, *see supra* note 22, and required EPA to make practical judgments in drawing lines in order to provide a "reasonable degree of protection" in responding to such

[38] APC Br. (99-1257), at 42-50; Ohio, *et al.*, Br. (99-1257), at 10-31. As EPA's supporters recognize, Congress in Subpart 2 "itself has balanced the public health and welfare goals of the statute against the economic and technological challenges posed by meeting these goals." Mass/NJ Br. (99-1426), at 28.

[39] *Compare* Air Quality Act of 1967 § 108(a), Pub. L. No. 90-148, 81 Stat. 485, 491 (1967), *with* CAA § 109(a); *see* Mass/NJ Br. (99-1257), at 13 (In 1970, "Congress instructed EPA to target health effects in *populations* rather than in single individuals.").

[40] *See 1970 Hrg.*, *supra* note 2, at 1487, *reprinted in* 2 *1970 Legis. Hist.*, *supra* note 2, at 1182 (Sen. Muskie).

potential public health problems.[41] In enacting the "Prevention of Significant Deterioration" program in 1977, CAA §§ 160-169B, Congress confirmed that the NAAQS program requires judgments as to when predicted health risks become a *public health* problem. *See* APC Br. (99-1426), at 43-45.

As a result, while protecting public health is the end that implementation of the NAAQS must achieve, the Act does not restrict the factors relevant to the Agency's exercise of risk management judgment in achieving that endpoint.

C. The Requirement to Protect "Public Health" and the Statutory Purposes Language of the Act Must Guide EPA's Exercise of Discretion in Revising NAAQS.

As discussed above, protecting the "public health" contemplates balancing to ensure that EPA's NAAQS decisions promote society's health and well-being. *See* APC Br. (99-1426), at 27-31.[42] As EPA recognizes, this statutory provision must be read "with due regard for the Act's purpose." EPA Br. (99-1257), at 22.

Congress explained that the Act is intended to "ensure the protection of the public health and the environment . . . while at the same time considering the energy and economic needs of this Nation."[43] Congress codified that intent in § 101(b)(1), which emphasizes *in statutory language* the importance of balancing to promote the "public health" and the "productive capacity" of the Nation. EPA has interpreted

[41] S. Rep. No. 91-1196, at 10, *reprinted in* 1 *1970 Legis. Hist.*, *supra* note 2, at 410, OJA 3687; *see also* H.R. Rep. No. 95-294, at 127, *reprinted in* 4 *1977 Legis. Hist.*, *supra* note 2, at 2594, OJA 3678.

[42] *See also* ATA Reply Br. (99-1426), Arg. § II; ALA Br. (99-1257), at 19 ("public health disciplines . . . furnish a detailed context for § 109(b)(1)'s 'public health' mandate.").

[43] H.R. Rep. No. 95-294, at 34-35 (1977), *reprinted in* 4 *1977 Legis. Hist.*, *supra* note 2, at 2501-02.

this provision as calling for a "balancing of the social and economic considerations with the environmental implications" of its decisions. 39 Fed. Reg. 31000 (1974).

EPA responds that the statutory purposes have no relevance here, because they cannot "take precedence over the CAA's specific language in Sections 108 and 109." EPA Br. (99-1426), at 42. But, as discussed above, nothing in the language of §§ 108 or 109 restricts the factors that EPA is to consider when exercising judgment as to what "margin of safety" is "adequate" in selecting from a range of health protective options. The statutory language of § 101(b) is therefore blindingly relevant to defining the factors that will govern the exercise of such judgments.

EPA argues next that the reference in § 101(b) to promoting the public health and welfare and the "productive capacity" of the Nation's population means only that improved air quality will "reduc[e] the harm that air pollution causes." EPA Br. (99-1426), at 43. But EPA counsel's characterization of congressional purpose as "less pollution is better" is inconsistent with both Congress' understanding and the Agency's prior interpretations of this language.

As EPA has explained, under § 101(b), "[i]t would be counterproductive if, in protecting public health through clearing the air, EPA were to create or exacerbate conditions that endangered public health or safety. [According to EPA, i]n its major regulatory rulemakings, EPA has carefully weighed any potential adverse environmental and public safety impacts against the benefits from its actions."[44]

Because §§ 108 and 109 do not "unambiguously" restrict factors relevant to managing risks, the Agency must turn to the statutory purposes to inform its exercise of discretion, and exercise that discretion in a way that achieves the balance contemplated by Congress in § 101(b).

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[44] 55 Fed. Reg. 41204, 41211-12 (1990).

III. THIS COURT CAN IDENTIFY PRINCIPLES THAT GUIDE EPA'S EXERCISE OF PUBLIC HEALTH RISK MANAGEMENT JUDGMENT.

EPA argues that "[t]he principle that a statute must be construed so as to avoid doubts as to its constitutionality applies only when the statute's meaning is unclear." EPA Br. (99-1426), at 48 n.43. Here, EPA views the statute as "unmistakably clear," *id.*, and argues that requiring the Agency to consider more factors would compound the nondelegation problem by giving EPA too much to consider.

Merely characterizing a range of risk and picking a point from the spectrum while reciting risk characterization factors, however, sheds no light on why there is a public health problem, and what is a "reasonable" degree of protection. As the Court observed in *Mistretta*, to avoid a nondelegation problem, Congress must not only have "clearly delineate[d] the general policy" of the statute but also "the boundaries of th[e] delegated authority." 488 U.S. 361, 372-73 (1989).

The constitutional problem perceived by the lower court arose precisely out of EPA's refusal to define the boundaries of its public health authority under § 109. *See* APC Br. (99-1257), at 25-31. If Congress provided *no* standards for EPA's public health decisions, then the Act would present a clear nondelegation problem. *See* GE Br. (99-1257), at 21-23, 29-30.

What then are the legal standards that flow from the Act's language, including the purposes section, and that can provide "reasonable coherence" for selecting a NAAQS?

As discussed above, the focus of the NAAQS program is on pollution that "endangers" the "public health," CAA § 108(a)(1), and its goal is establishing air quality levels that are "requisite to protect the public health." CAA § 109(b)(1). This language requires a determination whether the health risks at issue create a potential "public health" problem (i.e., a *significant risk* of adverse public health impacts). To make this determination, EPA must specifically address whether

the estimated risks are of sufficient magnitude and certainty to affect adversely the health of the community in light of, *inter alia*, other risks that EPA has found worthy of regulation, or that society is willing to accept.

If the Agency finds a potential public health problem, the Agency must then address what is a "reasonable" degree of protection. In exercising this judgment, EPA must address, *inter alia*, how differing risk management options compare with the status quo, and with the cost to society (e.g., health, environmental or economic costs) of any additional margin of safety. The balancing required by these risk management judgments is no secret; relevant factors have been described repeatedly by EPA and its science advisers.[45]

A balancing approach to risk management that assures protection of "public health and welfare" and the "productive capacity" of the Nation, backed up by a reasoned explanation of how the balance was struck, avoids the nondelegation problem perceived by the lower court. Furthermore, it assures the "reasonable coherence" necessary to avoid "arbitrary and capricious" decisionmaking and to enable judicial review. 175 F.3d at 1038-40, App. 13a-18a. Finally, because *Lead Industries* stands for the proposition that the overall costs to society of risk management options may play no role in NAAQS decisions, that decision must be overruled. *See* APC Br. (99-1426), at 45-49.

CONCLUSION

For the reasons discussed above, the revised PM and ozone NAAQS must be vacated, because EPA has failed to consider factors relevant to the exercise of its public health risk management judgment under § 109 of the Act.

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[45] *See, e.g.*, SAB, *supra* note 4, at 13 (Relevant factors for risk management decisions include "the societal values that both influence and are affected by the decision, including values relating to economic efficiency, sustainability, equity, and quality of life."), Reply App. 9a; *see generally supra* note 4; Marchant, *et al.*, Br. (99-1257), at 6-8. The balancing, of course, need not be strictly quantitative.

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APPENDIX

Framework for Environmental Health Risk Management

The Presidential/Congressional Commission on Risk Assessment and Risk Management

Final Report
Volume 1
1997

* * *

The Commission's Risk Management Framework

The Framework is general enough to work in a wide variety of situations. The level of effort and resources invested in using the Framework can be scaled to the importance of the problem, potential severity and economic impact of the risk, level of controversy surrounding it, and resource constraints. The Framework is primarily intended for risk decisions related to setting standards, controlling pollution, protecting health, and cleaning up the environment. It is useful for addressing these types of decisions at a local community level (e.g., siting an incinerator or cleaning up a hazardous waste site) or a national level (e.g., developing a national program for controlling motor vehicle emissions). The Framework need not be invoked for risk situations that are routinely and expeditiously managed—for example, by hazardous materials response teams, emergency room physicians, firefighter rescue teams, and voluntary product recalls.

Every stage of the Framework relies on three key principles:

Broader contexts. Instead of evaluating single risks associated with single chemicals in single environmental media, the Framework puts health and environmental problems in their larger, real-world contexts. Evaluating

problems in context involves evaluating different sources of a particular chemical or chemical exposure, considering other chemicals that could affect a particular risk or pose additional risks, assessing other similar risks, and evaluating the extent to which different exposures contribute to a particular health effect of concern. The goal of considering problems in their context is to clarify the impact that individual risk management actions are likely to have on public health or the environment and to help direct actions and resources where they will do the most good.

Stakeholder participation. Involvement of stakeholders—parties who are concerned about or affected by the risk management problem—is critical to making and successfully implementing sound, cost-effective, informed risk management decisions. For this reason, the Framework encourages stakeholder involvement to the extent appropriate and feasible during all stages of the risk management process. "Establish a Process for Engaging Stakeholders" on page 15 discusses in depth the value of and approaches to involving stakeholders.

Iteration. Valuable information or perspective may emerge during any stage of the risk management process. This Framework is designed so that parts of it may be repeated, giving risk managers and stakeholders the flexibility to revisit early stages of the process when new findings made during later stages shed sufficiently important light on earlier deliberations and decisions. ("The Importance of Iteration" on page 47 provides more information.)

Principles for Risk Management Decision-Making

A good risk management decision…

- Addresses a clearly articulated problem in its public health and ecological context.
- Emerges from a decision-making process that elicits the views of those affected by the decision, so that differing technical assessments, public values, knowledge, and perceptions are considered.
- Is based on a careful analysis of the weight of scientific evidence that supports conclusions about a problem's potential risks to human health and the environment.
- Is made after examining a range of regulatory and nonregulatory risk management options.
- Reduces or eliminates risks in ways that:
  - Are based on the best available scientific, economic, and other technical information.
  - Account for their multisource, multimedia, multichemical, and multirisk contexts.
  - Are feasible, with benefits reasonably related to their costs.
  - Give priority to preventing risks, not just controlling them.
  - Use alternatives to command-and-control regulation, where applicable.
  - Are sensitive to political, social, legal, and cultural considerations.
  - Include incentives for innovation, evaluation, and research.
- Can be implemented effectively, expeditiously, flexibly, and with stakeholder support.
- Can be shown to have a significant impact on the risks of concern.
- Can be revised and changed when significant new information becomes available, while avoiding "paralysis by analysis."

Advantages of the Commission's Risk Management Framework

Traditionally, risk management has relied on command-and-control approaches that often require environmental protection standards to be met using specific technologies. Risk management has generally focused on controlling single hazards in single environmental media. Many risk management failures can be traced to not including stakeholders in decision-making at the earliest possible time and not considering risks in their broader contexts. In contrast, the Commission's Risk Management Framework is intended to:

- ✓ Provide an integrated, holistic approach to solving public health and environmental problems in context.
- ✓ Ensure that decisions about the use of risk assessment and economic analysis rely on the best scientific evidence and are made in the context of risk management alternatives.
- ✓ Emphasize the importance of collaboration, communication, and negotiation among stakeholders so that public values can influence risk management strategies.
- ✓ Produce risk management decisions that are more likely to be successful than decisions made without adequate and early stakeholder involvement.
- ✓ Accommodate critical new information that may emerge at any stage of the process.

Potential Adverse Consequences

Analysis must consider whether an option may cause any adverse consequences. One of the most important is the potential for an option to increase one type of risk while reducing the risk of concern:

- While reducing pollutant concentrations in one environmental medium, the option may increase pollutants in another medium. For example, using aeration reduces pollutants in drinking water by releasing them to the air. (Of course, if exposure to air is considerably less than exposure to drinking water, this tradeoff may be worthwhile.)
- While reducing long-term health risks for community members, an option may produce short-term health risks and injury for workers, as can happen during cleanup of sites contaminated with hazardous chemical and radioactive wastes.
- Banning one pesticide because it might cause cancer may increase the use of another pesticide that is known to cause birth defects or to harm wildlife, or whose health effects are not known.

Thus, tradeoffs among different risks must be identified and considered.

Other adverse consequences may be cultural, ethical, political, social, or economic, such as:

- Economic impacts on a community, including reduced property values or loss of jobs.
- Environmental justice issues, such as inequitable distribution of costs and benefits as mentioned above; disregard for a particular population group's dietary needs, preferences, or nutritional status; or giving priority to site cleanup efforts in more affluent areas.
- Harming the social fabric of a town or tribe by relocating the people away from a highly contaminated area.

Risk Assessment in the Federal Government: Managing the Process

Committee on the Institutional Means for Assessment of Risks to Public Health

Commission on Life Sciences

National Research Council

National Academy Press
Washington, D.C. 1983

* * *

Risk Assessment and Risk Management

We use risk assessment to mean the characterization of the potential adverse health effects of human exposures to environmental hazards. Risk assessments include several elements: description of the potential adverse health effects based on an evaluation of results of epidemiologic, clinical, toxicologic, and environmental research; extrapolation from those results to predict the type and estimate the extent of health effects in humans under given conditions of exposure; judgments as to the number and characteristics of persons exposed at various intensities and durations; and summary judgments on the existence and overall magnitude of the public-health problem. Risk assessment also includes characterization of the uncertainties inherent in the process of inferring risk.

The term risk assessment is often given narrower and broader meanings than we have adopted here. For some observers, the term is synonymous with quantitative risk assessment and emphasizes reliance on numerical results. Our broader definition includes quantification, but also

includes qualitative expressions of risk. Quantitative estimates of risk are not always feasible, and they may be eschewed by agencies for policy reasons. Broader uses of the term than ours also embrace analysis of perceived risks, comparisons of risks associated with different regulatory strategies, and occasionally analysis of the economic and social implications of regulatory decisions--functions that we assign to risk management.

The Committee uses the term risk management to describe the process of evaluating alternative regulatory actions and selecting among them. Risk management, which is carried out by regulatory agencies under various legislative mandates, is an agency decision-making process that entails consideration of political, social, economic, and engineering information with risk-related information to develop, analyze, and compare regulatory options and to select the appropriate regulatory response to a potential chronic health hazard. The selection process necessarily requires the use of value judgments on such issues as the acceptability of risk and the reasonableness of the costs of control.

* * *

Toward Integrated Environmental Decision-Making

United States Environmental Protection Agency

Science Advisory Board
(1400A)
Washington, DC

EPA-SAB-EC-00-011
August 2000
www.epa.gov/SAB

* * *

2.3 Analysis and Decision-Making (Phase II)

In Phase II of the IED Framework, the analysts take the information and general directions gained in Phase I and generate more detailed, more fully supported assessments of risks and risk reduction options. For integrated decision-making, options analysis should include consideration of risk reduction opportunities with regard to their technical feasibility, aggregate risk reduction to be obtained (e.g., reductions in "target" risks and collateral reduction in all affected risks), full economic consequences of various risk reduction scenarios, and so forth. Decision-makers also should request analysis of potential options with regard to sustainability, equity, and other potential decision criteria.

Options analysis generally is more "analytic" than "deliberative" (NRC, 1996) although a continued level of interaction between the participants in the overall process (scientists, risk managers, and interested and affected parties) is important. Options Analysis is also more resource-intensive than Problem Formulation.

In the decision-making portion of Phase II, the Agency or other decision-makers should a) utilize outputs from the analyses of risk and risk reduction options, b) consider widely-held public values, as well as the views of

participating stakeholders, c) consider the legal, economic, and institutional constraints, and d) ultimately, make the decision. Clearly, this process is not totally scientific. However, the best science should inform and contribute to decision-making. Developments in the social and decision sciences, for example, are providing improved methods for value elicitation and multi-attribute decision-making. The documentation supporting the decision should make explicit a) the implications of the chosen management option(s) to the health of ecological or human systems, b) the economic costs and benefits associated with the selected option, and c) the societal values that both influence and are affected by the decision, including values relating to economic efficiency, sustainability, equity, and quality of life. Integrated decision-making requires explicit consideration of the trade-offs involved in pursuing multiple environmental goals and/or in simultaneously pursuing environmental and non-environmental goals. In some cases, analysis may indicate that a particular management option is not worth doing because of the greater good that might be achieved by investing those resources toward the achievement of another goal.

It is important that the scientific and technical analyses prepared during Phase II articulate clearly the uncertainties associated with the estimates of risk, the estimates of risk reduction that may be achieved by different management options, and the economic assessments of various risk management scenarios. Integrated decision-making does not eliminate the uncertainties associated with making decisions. However, by encouraging an open and comprehensive examination of environmental problems, integrated decision-making should lead to a clearer identification of the nature, extent, and consequences of the uncertainties associated with the available information. In any event, environmental decision-making must proceed in the presence of

uncertainties, and nothing in the proposed Framework should be construed as precluding environmental decisions simply because uncertainties remain.

* * *

3.1.2 What We Need

During the design of the Framework, the SAB participants acknowledged that technical risk rankings, in isolation, offered insufficient guidance for policy decisions. Given the multitude of problems and issues to be addressed, a more comprehensive and systematic framework for analyzing and reducing environmental health, ecological, and quality of life risks appeared necessary. During Problem Formulation, the Agency needs methods for comparing risks that are robust, transparent, effective, and inexpensive. As noted, some initial steps have been taken for ranking risks within categories; e.g., human health, quality of life, or ecosystem risks.

* * *

Supreme Court, U.S.
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No. 99-1426

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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I

INTRODUCTION

The Supporting States of Ohio, Michigan and West Virginia argued at the outset that EPA's failure to consider factors other than direct public health effects in setting an air quality standard for a non-threshold pollutant may require States to meet an unjustified standard that is impossible to implement using enforceable control measures. EPA does not respond to that argument. Instead, EPA characterizes cost and factors not directly related to the physical health of individuals as matters relating to the feasibility of compliance and, therefore, as only relevant to implementation. By doing so, EPA only highlights the problem with its approach—that implementation itself is impossible if EPA does not, in the first instance, account for the "public health" in a comprehensive way, subject proposed standards to a cost/benefit analysis to determine whether they are, in fact, beneficial to the public, and then articulate an intelligible basis for its decision.

EPA cannot justify its decision-making by relying on the "technology forcing" nature of the Clean Air Act. The Supporting States agree that the Act should force technological changes and that air standards must be based first and foremost on public health considerations. The Supporting States cannot agree, however, that EPA may, in the name of public health, set standards for non-threshold pollutants without any consideration for "health" in a complete sense and without any consideration for whether these new standards will truly benefit the citizens of our States.

As the Supporting States argued in Case No. 99-1257, EPA had no authority to revise the existing ozone standard. But even assuming such authority, the Supporting States ask that the Court vacate the PM and ozone rules and remand them to EPA for further consideration because EPA cannot

show that its new air standards are "requisite" to protect "public health." Such a remand avoids the constitutional question and retains Section 109 of the Act.

ARGUMENT

I. EPA Mischaracterizes Cost and Other Non-Health Factors As Compliance Issues.

EPA argues throughout its brief that consideration of technological feasibility should occur only at implementation. The Supporting States agree that the standards at issue here ultimately implicate compliance issues because unfounded standards lead inevitably to impossible implementation. However, EPA's focus on the "feasibility" of compliance is misplaced.

Cross-Petitioners have not simply raised questions of compliance, and are not, as EPA asserts, looking to "protect[] industry from 'compliance costs.'" EPA Brief at 37. Rather, the issues before the Court go to the heart of EPA's decision-making when setting standards for non-threshold pollutants. Despite uncertain science, and in the face of enormous costs to the States, industry, and, ultimately, the public, EPA must be able to articulate a basis for its proposed standards. Anything less violates the most basic principles of agency authority.

II. The Act Supports A Finding That EPA May Consider Cost and Other Non-Health Factors When Setting An Air Quality Standard.

In its brief, EPA employs a number of arguments in support of its main point—that it is not permitted to consider cost, technological feasibility, or factors other than direct public health effects when setting a national ambient air quality standard under Section 109(b)(1) of the Clean Air

Act. 42 U.S.C. 7409(b)(1). But EPA evades the real charge in this case—articulation of a cogent principle of statutory interpretation that will allow analysis of the statutory language itself to determine when factors not expressly listed in the relevant statute are to be considered by an agency. Instead, EPA employs an interpretation heavily laden with legislative history, without first carefully analyzing the statutory language.

For all its focus on this Court's decision in *Union Electric Co. v. U.S. EPA*, 427 U.S. 246 (1976), EPA has missed the critical point of statutory construction. Where Congress presents an agency with an *exclusive* list of factors it must consider in making a determination, the agency usually cannot consider other, non-listed factors in making its decision. In *Union Electric*, the Court found that a provision exclusively enumerating eight criteria for consideration did not authorize consideration of other criteria. *Id.* at 257. The logical corollary of this principle is that where such a list is *not exclusive*, the agency is permitted to consider other, relevant factors in making its determination. *See National Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"). It is this corollary principle that is at issue here, and at the root of the important conflict with *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), and its progeny.

Section 109 requires EPA to set or revise a standard based on "criteria" issued under Section 108. The "criteria" documents incorporate information on a non-exclusive list of topics, including information that might alter the effects of the pollutant on public health and the effect of other pollutants that might interact to cause adverse health effects. CAA § 108(a)(2)(A)-(B); 42 U.S.C. 7408(a)(2)(A)-(B). The fact that the list in Section 108(a)(2) is non-exclusive indicates that information other than "effects on public health

or welfare" may be considered when issuing "criteria" documents upon which to set or revise a standard.

EPA argues that the list in Section 108(a)(2) "are all encompassed within, and limited by, Section 108(a)(2)'s general directive that 'air quality criteria' shall provide information on the health and welfare effects posed by 'the presence of such pollutant in the ambient air.'" But EPA misses the point that the list in 108(a) is *not exclusive*; it directs that the criteria "shall include" various information, but does not use "only," "exclusive," or any other language that makes that list exclusive.

And the language of Section 108(b) reinforces that interpretation of Section 108(a). Simultaneously with issuance of the criteria, EPA collects and issues to the States "information on air pollution control techniques." CAA § 108(b)(1); 42 U.S.C. 7408(b)(1). EPA gathers the information in consultation with advisory committees and federal departments and agencies. CAA § 108(b)(1); 42 U.S.C. 7408(b)(1). The information includes data on a wide range of factors, including cost of installation and operation, energy requirements, emission reduction benefits, environmental impacts of the emission control technology, alternative fuel processes, and operating methods that will result in the elimination or reduction of emissions. CAA § 108(b)(1); 42 U.S.C. 7408(b)(1).

EPA argues that Section 108(b) indicates only that Congress wanted to continue the program of "separately" providing States with information on emission controls so that the States can implement air quality standards. But if so, it is much more likely that Congress would have truly separated the language, by putting it in Section 110, which describes state implementation plans. Its presence in 108 suggests that the information is connected with establishing

criteria, not implementing state plans. CAA § 110; 42 U.S.C. 7410.

Also, Section 109(d), under which EPA is to review and revise criteria and standards every five years, requires the establishment of an independent scientific review committee to review and recommend changes to the criteria and standards. CAA § 109(d)(2)(A); 42 U.S.C. 7409(d)(2)(A). The committee is to advise the Administrator of a large number of factors, including "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." CAA § 109(d)(2)(C)(iv); 42 U.S.C. 7409(d)(2)(C)(iv).

EPA again argues that the language in Section 109 requiring committee advice on a long list of health and non-health issues is in a separate subsection from that requiring advice on reevaluating air quality standards, and therefore that the non-health factors are not to be considered when revising the standard. However, EPA does not suggest why the committee is to gather this information and report to the Administrator, if she is not to use it in revising an air quality standard. And the presence of such a requirement in Section 109, rather than elsewhere in the Act, indicates that the purpose of the information is for revising standards.

In short, EPA has not shown that the statutory language prohibits consideration of cost and non-health factors. Indeed, many provisions suggest that such factors can and should be considered.

III. The Legislative History of the Clean Air Act Does Not Unequivocally Establish That Cost and Technological Feasibility May Not Be Considered in Setting A National Air Quality Standard.

EPA relies heavily on various remarks made during congressional hearings for its proposition that costs and other non-health factors may not be considered in setting an air quality standard. The Supporting States cited to legislative statements that indicate Congress intended for costs to be considered.

For instance, EPA cites various passages, mostly comments made by Senator Muskie during the 1970 hearings. However, other members make comments that indicate otherwise. For example, Senator Baker states:

> Now, on the other side of the question of where [the standard] ought to be set is unanswerable. And it will continue to be unanswerable because we at the legislative department and the executive department through its appropriate administrative channel are going to have to monitor *the state of the art, the condition of the world, the economic impact in dislocations*, the situation as it continues from year to year and decide what we are going to do about it.

Hearings on Air Pollution Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Pub. Works, 91st Cong., 2d Sess. Pt. 4, at 1488, 1489 (1970), *(Air Pollution Hearings) reprinted in* 2 Staff of Senate Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970* at 1186 (Comm. Print. 1974) (hereinafter "2 1970 Leg. Hist.") (emphasis supplied); EPA Brief at 28, n.8. This passage at least implies that economic impacts will influence the revision of air quality standards.

In addition, EPA cites Senator Muskie "reemphasiz[ing] that the concept of this bill . . . is not keyed to any condition that [EPA] finds technically and economically feasible." EPA Brief at 26. This comment was made in regard to the amendment creating a standing consulting committee for each pollutant to advise EPA on technology and costs. However, the sponsor of the amendment, Senator Randolph commented:

> It is my belief that since enactment of the 1967 amendments to the Clean Air Act, it has become apparent that one of the deficiencies . . . has been the agency's lack of understanding of industrial pollution control techniques. It is, of course, easy for Government to arrive at a set figure for industry to meet *without giving due consideration to whether those requirements are obtainable on the basis of available control technology.*

1 1970 Leg. Hist. 341 (emphasis supplied). Again, this passage at least implies that available control technology should be considered in setting a standard.

These examples, together with those cited in the Supporting States' opening brief, indicate that there are numerous instances in the legislative history where members of Congress express the opinion that factors other than public health are to play a role in setting and revising an air quality standard. Thus, at the very least, the legislative history indicates a diversity of opinion on the issue and may be more accurately interpreted that Congress did not want cost and technological feasibility to stand in the way of meeting a standard. In any case, the history does not go to how EPA is to determine standards for non-threshold pollutants. EPA's heavy reliance on such a history is therefore misplaced, and

should be given less credence than the statutory language itself.

IV. Expanding the Number of Factors EPA May Consider in Setting an Air Quality Standard Narrows Choices and Allows for An "Intelligible Principle" in Setting the Standard, Thus Avoiding the Issue of Nondelegation.

Finally, despite the uncertainty surrounding the standards, EPA argues that expanding the range of factors that it may consider in setting an air quality standard would exacerbate the problem of defining a standard, as it would increase, rather than decrease its discretion under Section 109. EPA Brief at 47-49. Therefore, in EPA's view, consideration of cost and other factors does not avoid the nondelegation question. But, contrary to EPA's contention, additional factors actually narrow, rather than broaden, choices in decision-making and, therefore, resolve the issues before the Court without the need to resolve the constitutional question.

Useful analogies abound to illustrate this point. In a well-known principle of plane geometry, an infinite number of straight lines can be drawn through a single point, but two points define only one straight line. In the purchase of a car, if the only criterion for the car is its size, a huge number of choices are available. As each new criterion (*e.g.*, price, color, safety record, gas mileage, etc.) is added to the decision-making process, the choices narrow dramatically.

So it is here. In determining an air quality standard, consideration of the single factor of health effects on individuals (especially for a non-threshold pollutant) identifies a broad range of possible standards. Addition of the further factors of societal costs and benefits narrows that

range considerably and will help, rather than hinder, definition of a standard based on an "intelligible principle."

Limited considerations of costs and other factors do not involve an "open ended inquiry" into every conceivable cost, as EPA suggests. Cost-benefit analysis "is simply a weighing of all the desirable effects of a proposed action against all the undesirable effects, whether or not they are susceptible of being expressed in economic terms." A. Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 Hous. L. Rev. 97, 101 (1987). *See also International Union v. OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991). Therefore, the inquiry may reasonably involve only those costs directly relevant to the limitation of a particular pollutant. Of course, as EPA asserts, that inquiry will be open to debate. But such debate is the price of public comment and agency rulemaking. And the ultimate agency decision resulting from such an analysis "is particularly difficult for a court to second-guess." 24 Hous. L. Rev. at 101.

On the other hand, failing to consider any factor other than direct health effects results in the present, unreasonable result—no intelligible principle whatsoever for the ozone and particulate matter standards. EPA reasonably should consider costs and other non-health factors when setting and revising a national air quality standard.

CONCLUSION

For the foregoing reasons, the States of Ohio, Michigan and West Virginia respectfully request that the Court order the lower court to vacate the ozone and particulate matter standards, and remand the particulate matter standard to EPA for reconsideration of those standards.

Respectfully submitted,

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IN THE
Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Cross-Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE GENERAL ELECTRIC COMPANY AS AMICUS CURIAE IN SUPPORT OF CROSS-PETITIONERS

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35-08

QUESTION PRESENTED

Whether the Environmental Protection Agency is required, in setting nationwide air-quality standards under Section 109 of the Clean Air Act, to consider costs and risk trade-offs in order to engage in reasoned decisionmaking.

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INTEREST OF AMICUS CURIAE

The General Electric Company ("GE") is a diversified manufacturing and financial services company headquartered in Fairfield, Connecticut.[1] GE has numerous business units that provide a broad range of goods and services throughout the United States and the world, including aircraft engines, appliances, capital services, industrial systems, lighting, medical systems, the NBC television network, plastics, power systems, and transportation systems.

GE has a continuing interest in the proper interpretation not only of the Clean Air Act, but of health and safety regulation generally. Society's interests are best served by a rational system of risk management that considers not merely the benefits of proposed agency action, but also costs of compliance and likely risk trade-offs. Because of the diversity of GE's business activities, it can offer helpful guidance to this Court on the need to focus on a global, reasoned, and systematic approach to risk regulation, which will result in better policies that provide more protection for human health and the environment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important opportunity not only to correct the Court of Appeals' misinterpretation of Section 109 of the Clean Air Act, but also to establish a broader principle about risk regulation generally. This Court should hold that agency action under environmental and other regulatory statutes, including the Clean Air Act, is not reasoned unless the agency considers (1) costs of compliance (including marginal costs) and (2) risk trade-offs caused by the agency action. The agency must also give a reasoned explanation of how it considered those

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amicus states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amicus, its members, or its counsel, has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, amicus states that the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

factors. These principles are grounded both in organic regulatory statutes (such as the Clean Air Act) and in the requirements of the Administrative Procedure Act, 5 U.S.C. § 706. *See Motor Vehicles Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 42, 52, 57 (1983).

This case demonstrates the astonishing results of an agency's failure to take costs and risk trade-offs into account. EPA never considered whether the massive costs associated with its proposals (as much as $150 billion annually) might ironically promote the very conditions that lead to the asthma and other respiratory problems EPA sought to prevent. In fact, EPA deliberately refused to consider such costs due to a misguided 20-year-old-decision of the D.C. Circuit Court of Appeals. *Lead Industries Assns. v. EPA*, 647 F.2d 1130, 1148, 1153-54 (D.C. Cir.) (Wright, C.J.), *cert. denied*, 449 U.S. 1042 (1980). Because the costs of EPA's rules are likely to be passed on to society at large, they can be expected to increase consumer prices and will almost certainly have a disproportionate impact on the poorest segments of the population, which are at the highest risk for asthma and other respiratory diseases.[2] Given the conclusion of the American Thoracic Society that "poverty may be the number one risk factor for asthma," EPA's rules may aggravate the problem they are intended to solve.

Moreover, EPA ignored the likely effect of its ozone rule on skin cancer rates. Due to ozone's beneficial blocking effect on ultraviolet-B (UV-B) radiation, the revised ozone standard will increase malignant and non-melanoma skin cancers and cataracts. An uncontradicted Department of Energy analysis indicates that EPA's ten parts per billion (ppb) change in the ozone standard could result in 25-50 new melanoma-caused fatalities, 130 to 260 incidences of cutaneous melanoma, 2,000 to 11,000 new cases of non-melanoma skin cancer, and 13,000

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[2] *See* Susan E. Dudley, *Economic Impact Analyses*, 16 PACE ENVTL. L. REV. 81, 84 (1998); Susan E. Dudley & Wendy L. Gramm, *EPA's Proposed Ozone Standard May Harm Public Health and Welfare*, 17 INT'L J. OF RISK ANALYSIS 403 (Aug. 1997).

to 28,000 new incidences of cataracts each year. EPA refused to consider this purely health-related trade-off effect of its revised standard.

The text and structure of Section 109 indicate that EPA must consider costs and risk trade-offs in setting National Ambient Air Quality Standards ("NAAQS"). If there were any doubt about the meaning of Section 109, this case would be governed by the principle that reasoned decisionmaking about the regulation of economic activity demands consideration of costs and of risk trade-offs. Under basic precepts of administrative law, agencies are required to conduct a "reasoned analysis" and provide a "reasoned basis" for their decisions. *State Farm*, 463 U.S. at 42, 52, 57. To qualify as "reasoned" under this standard, agency action must consider costs and risk trade-offs. Congress, administrative agencies, and courts have all recognized the importance of considering these factors, and regulatory statutes should be construed with reference to that background principle.

An agency which is *permitted* to consider costs and risk trade-offs is acting arbitrarily unless it *actually does consider* them. Consideration of costs and risk trade-offs is necessary for reasoned decisionmaking in the absence of an express congressional statement precluding an agency from taking those factors into account. "It is only where there is 'clear congressional intent to preclude consideration of cost' that [courts] find agencies barred from considering costs." *Michigan v. EPA*, 2000 U.S. App. LEXIS 3209, *36 (D.C. Cir. Mar. 3, 2000) (citation omitted), *pet. for reh'g and pet. for reh'g en banc denied,* June 22, 2000.

Because there is no clear congressional statement forbidding EPA from considering compliance costs or risk trade-offs in setting NAAQS, EPA is required to consider those factors in order to exercise reasoned decisionmaking under Section 109 of the Clean Air Act.

ARGUMENT

I. REASONED DECISIONMAKING REQUIRES CONSIDERATION OF COSTS AND RISK TRADEOFFS

This Court should articulate a strong presumption that agency action under environmental and other regulatory statutes is unreasonable and contrary to law unless the agency considers (1) costs of compliance (including marginal costs) as well as benefits and (2) risk trade-offs caused by the agency action. This principle follows both from organic regulatory statutes and from the requirements of the Administrative Procedure Act, 5 U.S.C. § 706.[3]

The principle is little more than plain common sense. Two months after the EPA finalized the ozone rule at issue in this case, the Office of Management and Budget reported to Congress that "the only way we know to distinguish between the regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs."[4] Executive orders issued by the Reagan and Clinton Administrations have required agencies to consider costs.[5] Even EPA's Science Advisory Board has documented the dangers of ignoring costs and risk trade-offs.[6] Because allocative choices

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[3] The Clean Air Act itself provides that a reviewing court may reverse any action of the EPA that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Section 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A).

[4] Office of Information and Regulatory Affairs, Office of Management and Budget, Report to Congress on the Costs and Benefits of Federal Regulations 10 (1997).

[5] See Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1993), reprinted in 5 U.S.C. 601 (1994); Exec. Order No. 12,291, 3 C.F.R. 127 (1981), revoked by Exec. Order No. 12,866. *See generally* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6-7 (1995).

[6] Reducing Risk: Setting Priorities and Strategies for Environmental

made in protecting health and the environment cannot be made in a vacuum, risk management decisions made without regard to associated costs, or without regard to risk trade-offs, are necessarily arbitrary and unreasonable.

As Justice Powell commented in the *Benzene* case, "[t]housands of toxic substances present risks that fairly could be characterized as 'significant.'" *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 670 (1980) (concurring opinion). But "[e]ven if OSHA succeeded in selecting the gravest risks for earliest regulation, a standard-setting process that ignored economic considerations would result in a serious misallocation of resources and *a lower effective level of safety* than could be achieved under standards set with reference to the comparative benefits available at a lower cost." *Id.* (emphasis added). "I would not attribute such an irrational intention to Congress." *Id.*

The need to consider costs and risk trade-offs finds wide support in contemporary studies of the regulatory process.[7] One noted commentator has estimated that a more rational prioritization of regulatory policies could save 60,000 lives, with the expenditure of no additional resources.[8]

Protection, Report of the Science Advisory Board: Relative Risk Reduction Strategies Committee to Administrator, U.S.E.P.A. (Sept. 1990).

[7] *See, e.g.*, Harvard Group on Risk Management Reform, *Reform of Risk Regulation: Achieving More Protection at Less Cost*, 1 HUM & ECOLOGICAL RISK ASSESSMENT 183 (1995); National Academy of Public Administration, Setting Priorities, Getting Results: A New Direction for the U.S. Environmental Protection Agency (1995); President's Council on Sustainable Development, Eco-Efficiency Task Force Report ch 2 (1995) <http://www.whitehouse.gov/WH/EOP/pcsd/tf-reports/eco-top.html>; Carnegie Commission on Science, Technology, and Government, Risk and the Environment: Improving Regulatory Decision Making (1993).

[8] John D. Graham, *Legislative Approaches to Achieving More Protection at Less Cost*, 1997 U. CHI. LEGAL F. 13; *see also* Tammy O. Tengs et al., *Five Hundred Life-Saving Programs and Their Cost-Effectiveness*, 15 RISK ANALYSIS 369 (1995); Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Lifesaving*, in Robert

For instance, agency action in the context of CERCLA, the Superfund statute, has often been plagued by a failure to consider costs and risk trade-offs. Cleanup of hazardous waste sites creates increased risk of accidental fatalities, especially in construction and transportation jobs. For a typical site, the accident fatality risk from a cleanup appears to be several times larger than the health risk from not cleaning up.[9] *See generally* John D. Graham & Jonathan B. Wiener, eds., RISK VS. RISK (1995) (documenting many instances where regulatory actions aimed at one risk have spawned even greater countervailing risks).

EPA has often proposed costly Superfund remedies to target trivial risks. In *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 441 (1st Cir. 1990) (Breyer, J.), the First Circuit affirmed a district court's denial of EPA's proposed remedy for cleaning up soil contaminated with PCBs. EPA sought a remedy that would have reduced PCB concentrations to 20 parts per million ("ppm") rather than 50 ppm, at a marginal cost of $9.3 million. EPA's decision was based on its extraordinary assumptions that (a) developers would build residential housing on the previously undeveloped site, (b) small children, playing in the backyard, would eat dirt containing PCBs, and (c) the children would eat such dirt each day for 245 days per year for three and a half years. *Id.* at 441. The court of appeals opined that "[o]ne might conclude from the cited portions of the record that this amounts to a very high cost for very little extra safety." *Id. See also* Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 12 (1993) (spending $9.3 million to protect "non-existent dirt-eating children" is the problem of

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W. Hahn, ed., RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION 167, 172 (Oxford 1996). See also Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996).

[9] Alan F. Hoskin, J. Paul Leigh & Thomas W. Planek, *Estimated Risk of Occupational Fatalities Associated With Hazardous Waste Site Remediation*, 14 RISK ANALYSIS 1011 (1994).

"the last 10 percent").

This case demonstrates the dangers of ignoring costs and risk trade-offs. EPA has cited the effects of ozone on asthma and other respiratory diseases, predicting that its rule will reduce "hospital admissions and emergency room visits for respiratory causes, among children and adults with pre-existing respiratory disease such as asthma" and may avoid "possible long-term damage to the lungs." National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50). Yet even proponents of the EPA rule acknowledge that the vast majority of the population "will observe no effect on their health or well-being as a result of this rule."[10] The President's Council of Economic Advisors has concluded that "reductions in adverse health effects, even for 'sensitive' populations, are small."[11]

With respect to particulate matter, which encompasses a range of different substances of varying sizes and composition, EPA has acknowledged the "uncertainty in the characterization of health effects attributable exposure of ambient PM."[12] The National Academy of Sciences warned that "at the present time, there is uncertainty as to what specific types or components of particulate matter need to be reduced to achieve substantial health-risk reduction cost effectively" and that "[p]roceeding in the absence of such information could leave policymakers to focus on standards and controls for particulate matter that are not of the highest public health priority."[13] In appropriating funds for further PM research, Congress has stated in conference

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[10] Dudley, *supra* note 2, at 84.

[11] *Id.* (quoting comments).

[12] National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,655 (1997) (to be codified at 40 C.F.R. pt. 50).

[13] Board of Environmental Studies and Toxicology, National Research Council, RESEARCH PRIORITIES FOR AIRBORNE PARTICULATE MATTER: I. IMMEDIATE PRIORITIES AND A LONG-RANGE RESEARCH PORTFOLIO 10, 15 (1998).

reports that "at present, there appears to be insufficient data available for the Agency to decide what changes, if any, should be made to the current standard"[14] and that "sufficient facts are not yet available to proceed with future regulations for a new particulate standard."[15] After EPA issued the revised PM standard, Congress postponed implementation until monitors were put in place and three years' worth of data were gathered.[16] Congress also postponed implementation of the ozone standard by one year.[17]

Both Congress and EPA have thus recognized that the benefits claimed by the agency are speculative. Weighing against these tenuous benefits are substantial costs. According to the EPA's analysis, full implementation of the ozone standard will impose direct annual costs of $ 9.6 billion, with monetized health and welfare benefits ranging from $ 1.5 to $ 8.5 billion.[18] Hence, EPA acknowledged that the costs of the ozone standard will exceed its expected benefits. Implementation of both the ozone and the particulate standards will cost, according to EPA, close to $47 billion annually[19] – more than the Nation currently

[14] H.R. Rep. No. 104-812, at 70 (1996).

[15] H.R. Rep. No. 105-297, at 115 (1997).

[16] Pub. L. No. 105-178, §§ 6101-03, 112 Stat. 465 (1998).

[17] Pub. L. No. 105-178, § 6103(a), 112 Stat. 465 (1998).

[18] See National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) (to be codified at 40 C.F.R. pt. 50); Revised Requirements for Designation of Reference and Equivalent Methods for PM and Ambient Air Quality Surveillance for Particulate Matter, 62 Fed. Reg. 38,764 (1997) (to be codified at 40 C.F.R. pts. 53 and 58); Innovative Strategies and Economics Group, EPA, Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule 13-2 (1997).

[19] Innovative Strategies and Economics Group, *supra* note 18, at 13-2.

spends for all Clean Air Act programs combined.[20]

There are substantial indirect costs as well. EPA believes that, even by the year 2010, a large part of the country will not be able to meet the new standards and thus will face penalty provisions under the law that will slow economic growth.[21] One analyst calculates some $80 billion in hidden costs stemming from the penalty provisions triggered by such inability to comply.[22] Another analyst puts the total cost at $150 billion.[23]

The very magnitude of these costs makes it unthinkable that Congress intended EPA to disregard them. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000) ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."). Moreover, EPA has made no effort to justify the tremendous costs associated with its proposal. This failure is significant because regulatory costs have substantial negative impacts on public health. As one federal court has cautioned, "[h]igher income is associated with better nutrition and medical care; regulations creating costs exceeding $ 7.5 million per life (directly) saved may well yield greater indirect loss of life." *Monsanto Co. v. EPA.*, 19 F.3d 1201, 1210 (7th Cir. 1994); *see also International Union, UAW v. OSHA*, 938 F.2d 1310, 1326 (D.C. Cir. 1991) (Williams, J., concurring) (explaining that recent studies predict that "each $7.5 million of costs generated

[20] See Office of Air and Radiation, EPA, The Benefits and Costs of the Clean Air Act: 1970 to 1990, at ES-2 (1997).

[21] EPA estimates that between thirty-nine and fifty-seven million people will live in areas that cannot attain the old standard, and an additional fourteen to thirty-two million people will live in areas that are out of compliance with the new standard. See National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,856.

[22] Dudley, *supra* note 2, at 83.

[23] Anne E. Smith, *et al.*, *Costs, Economic Impacts, and Benefits of EPA's Ozone & Particulate Standards* 9 (1997), OJA 3323.

by regulation may . . . induce one premature fatality" in the public through reduced availability of resources for medical care and safety).

EPA's revised standards will impose massive costs on economically productive activities – increasing consumer prices, reducing employment, and decreasing incomes and living standards. These effects will be felt most acutely by the poor and other segments of the population at highest risk for the health problems targeted by EPA. Asthma is overrepresented among the urban poor and has increased in recent years despite overall improvements in air quality (ground ozone levels in particular declined six percent between 1986 and 1995).[24] A report by the National Institute of Allergy and Infectious Diseases concluded that "the leading cause of asthma by far was . . . proteins in the droppings and carcasses of the German cockroach."[25] The American Thoracic Society has offered that "poverty may be the number one risk factor for asthma."[26]

The substantial costs imposed by EPA's rules could ironically promote the very conditions that lead to asthma and other respiratory problems. Yet EPA never even considered the possibility that its "cure" could be worse than the disease.

Moreover, EPA ignored the likely effect of its ozone rule on skin cancer rates.[27] Due to ozone's beneficial blocking effect on ultraviolet-B (UV-B) radiation, the revised ozone standard will increase malignant and non-melanoma skin cancers and cataracts. The protective effect of ozone is well documented and forms the basis for EPA's own stratospheric ozone rules.[28] Tropospheric ozone is, if anything, more effective than

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[24] EPA, Office of Air Quality, Nat'l Air Quality and Emission Trends Rep. (1995).

[25] Quoted in Dudley, *supra* note 2, at 84.

[26] *Id.* at 84-85.

[27] *See* Dudley & Gramm, *supra* note 2.

[28] 42 U.S.C. § 7671.

stratospheric ozone at blocking UV-B radiation.[29] EPA has acknowledged that its ozone rule will have a deleterious impact on UV-B related health problems.[30] An uncontradicted Department of Energy analysis indicates that the ten parts per billion (ppb) change in the ozone standard could result in 25-50 new melanoma-caused fatalities, 130 to 260 incidences of cutaneous melanoma, 2,000 to 11,000 new cases of non-melanoma skin cancer, and 13,000 to 28,000 new incidences of cataracts each year.[31] A peer-reviewed scientific paper by two Office of Management and Budget staff members reached a similar conclusion.[32]

Rather than addressing these important tradeoffs, EPA declined to consider them in promulgating its new ozone standard. And it declined to consider the possible existence of other, cheaper means to achieve its objectives. Such decisionmaking is arbitrary and unreasonable. The risks of such a process are illustrated by the tragic decision by Peru to suspend chlorination of its drinking water in the wake of U.S. risk

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[29] Paul J. Crutzen, *Ultraviolet on the Increase*, 356 NATURE 104 (1992) ("Ozone in the troposphere, an industrial pollutant, is (molecule for molecule) a stronger absorber of ultraviolet than ozone in the stratosphere"); *see generally* Ignacio Galindo *et al.*, *Ultraviolet Irradiance over Mexico City*, 45 AIR & WASTE MGMT. ASS'N 886 (1995); National Research Council, Rethinking the Ozone Problem in Urban and Regional Air Pollution 110 (1991); G. Seckmeyer & R.L. McKenzie, *Increased Ultraviolet Radiation in New Zealand (45 [degrees] S) Relative to Germany (48 [degrees] N)*, 359 NATURE 135 (1992); John E. Frederick *et al.*, *Empirical Studies of Tropospheric Transmission in the Ultraviolet: Broadband Measurements*, 32 J. APPLIED METEOROLOGY 1883 (1993).

[30] EPA, *Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers* (Draft) (Sept. 1994) (Ozone JA 3089-3104).

[31] Statement of Marvin Frazier, DOE Office of Health & Environmental Research Before CASAC (Mar. 21, 1995), Ozone JA 258-59.

[32] Randall Lutter & Christopher Wolz, *UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standard*, 31 ENVTL. SCI. & TECH. 142A (1997).

assessments classifying the chlorination process as carcinogenic. This decision led to the largest outbreak of cholera in recent times, in which over 800,000 people became ill and nearly 7,000 died.[33]

II. THE CLEAN AIR ACT AND WELL-ESTABLISHED LEGAL PRINCIPLES MANDATE CONSIDERATION OF COSTS AND RISK TRADE-OFFS

EPA's refusal to consider costs and risk trade-offs in the ozone and particulate matter rulemakings is thus the hallmark of arbitrary and capricious decisionmaking. EPA's action should be held violative both of the Clean Air Act and of familiar principles of administrative law. Acts of Congress empowering agencies to regulate economic activity should be construed in light of the fact that reasoned decisionmaking about these matters requires consideration of costs and of risk trade-offs.

A. The Clean Air Act Compels Consideration of Costs and Risk Trade-Offs

Two sections of the Act govern the establishment, review, and revision of National Ambient Air Quality Standards ("NAAQS"). Section 108 (42 U.S.C. § 7408) directs EPA to identify certain pollutants which "may reasonably be anticipated to endanger public health or welfare" and to issue air quality criteria for them. These air quality criteria are to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air . . . ."

Section 109 (42 U.S.C. § 7409) directs EPA to propose and

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[33] Christopher Anderson, *Cholera Epidemic Tied to Risk Miscalculation*, 354 NATURE 255 (Nov. 28, 1991).

promulgate "primary" and "secondary" NAAQS for pollutants identified under Section 108. Those standards may then be reviewed and revised as "appropriate." Section 109(d)(1). Section 109(b)(1) defines a primary standard as one "the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria and allowing an adequate margin of safety, are requisite to protect the public health." A secondary standard, as defined in section 109(b)(2), must "specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria, [are] requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air."

1. EPA must consider costs and risk trade-offs in using "judgment" to provide "an adequate margin of safety."

The statute certainly does not *direct* EPA to reduce health risks without regard to cost or risk trade-offs. Rather, on its face Section 109(b)(1) directs the EPA Administrator to use her "judgment" in providing "an adequate margin of safety . . . to protect the public health." In order to make a reasoned "*judgment*," EPA is surely bound to consider costs and risk trade-offs. In deciding whether a revised standard is "*appropriate*" under Section 109(d)(1), EPA must consider the same factors.

Further, in deciding whether a "margin of safety" is "*adequate*" under Section 109(b)(1), EPA must address cost and risk trade-offs – just as an agency must consider the same factors in deciding whether a certain margin of safety is "*ample*" or whether a particular health risk is "*significant*." A margin of safety is not "adequate" if it entails excessive costs or risks. Just as one is entitled to ask, "Can an agency sensibly decide whether a risk is 'significant' without also examining the cost of eliminating it?", Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein & Matthew L. Spitzer, ADMINISTRATIVE LAW AND REGULATORY POLICY 65 (4th ed. 1999), one is also entitled to ask, "Can an agency sensibly exercise 'judgment' in deciding whether a 'margin of safety' is 'adequate' without considering

cost?"

Thus, in *Michigan v. EPA*, 2000 U.S. App. LEXIS 3209, *34-35 (D.C. Cir. Mar. 3, 2000), *pet. for reh'g and pet. for reh'g en banc denied,* June 22, 2000, the D.C. Circuit held that determining whether emissions "contribute significantly" to the nonattainment of pollution standards entailed consideration of costs. The D.C. Circuit held that cost is relevant where a statutory "mandate directed to some environmental benefit is phrased in general quantitative terms ('ample margin of safety,' 'substantial restoration,' and 'major')," even where the text "contains not a word alluding to non-health trade-offs." *Id.* at *36.

And in *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc), the court of appeals held that costs were relevant to determining whether an air quality standard for hazardous pollutants under § 112 of the Clean Air Act offered an "ample margin of safety" to protect the public health.

Section 109 is structured in similarly "general quantitative terms," *Michigan v. EPA*, 2000 U.S. App. LEXIS 3209, at *36, using precisely the sort of terminology ("judgment," "appropriate," "adequate margin of safety") that by its nature requires consideration of cost and risk trade-offs.

2. EPA must consider costs and risk trade-offs in protecting the "public health" under Section 109.

Section 109(b) directs EPA to protect the "public health" rather than the health of any particular person. By contrast, other provisions of the Clean Air Act direct EPA to focus on certain specific subpopulations – such as particularly susceptible individuals or those most exposed to a pollutant.[34] The distinction is important. "Public health" is a multi-dimensional concept referring to a variety of factors relating to mortality, morbidity, and life expectancy. Promoting the "public health"

[34] Section 108(f)(1)(C), 42 U.S.C. § 7408(f)(1)(C); Section 112(c)(9)(B)(i), 42 U.S.C. § 7412(c)(9)(B)(i); Section 112(f)(2)(A), 42 U.S.C. § 7412(f)(2)(A).

entails managing risks in a comprehensive way.

"Public health" efforts are "directed toward sanitation of the environment, control of communicable infections, . . . and *the development of social machinery to ensure for every individual a standard of living adequate for the maintenance of health.*" 9 ENCYCLOPEDIA BRITANNICA: MICROPEDIA 778 (15th ed. 1992) (emphasis added). A leading public health official and cancer specialist in the United Kingdom described "improvements in nutrition, housing, water supplies, and sewage" as "fairly simple improvements in public health." John Cairns, CANCER: SCIENCE AND SOCIETY 8 (1978).

As Justice Powell recognized in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), the "shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in ambient air quality." *Id.* at 272 (concurring opinion). A House report accompanying the 1977 Clean Air Amendments explained that "a healthful environment, energy conservation, and a sound economy are interrelated factors bearing on the quality of life of the Nation." H.R. Rep. No. 95-294, at 61 (1977). Precisely because of the dangers of ignoring costs and risk trade-offs, public health scholars have urged "a more holistic paradigm [in] which decisionmakers would 'treat the whole patient' instead of confining their thinking to bounded fragments of larger systems." Graham & Wiener, RISK VS. RISK, at 227.

By directing EPA to promote the "public health," Congress instructed the agency to take a broad view that necessarily includes consideration of costs and risk trade-offs.

3. Section 108 confirms that EPA must consider costs and risk trade-offs.

Section 109 must be read in conjunction with Section 108, which sets out the criteria by which EPA is to identify pollutants for which NAAQS must be set. Section 108(a)(2) directs EPA to consider public "welfare" as well as "public health" and to consider "any known or anticipated adverse effects on welfare," not just impacts on health. Welfare effects as defined in section 302(h) (42 U.S.C. § 7602(h)) include, but are not limited to,

"effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, *as well as effects on economic values and on personal comfort and well-being*." (emphasis added).

Accordingly, from the very beginning of the process by which NAAQS are established, EPA is instructed to consider costs and risk trade-offs in the form of "effects on economic values and on personal comfort and well-being." Indeed, Section 108(a)(2) directs EPA to consider "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare." 42 U.S.C. § 7408(a)(2).

4. The structure of the statute likewise confirms that EPA must consider costs and risk trade-offs.

Section 109(d)(2) of the Clean Air Act requires appointment of an independent scientific review committee to review criteria and standards and recommend new standards or revisions of existing criteria and standards, as appropriate. The committee established under section 109(d)(2) is known as the Clean Air Scientific Advisory Committee (CASAC), a standing committee of EPA's Science Advisory Board. Section 109(d)(2)(C) requires the CASAC to "advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." 42 U.S.C. § 7409(d)(2)(C).

Thus, Congress required, in the statutory section governing adoption of NAAQS, that the EPA Administrator be advised on the "economic" and "social" effects of such standards. Such a mandate would be odd indeed if the Administrator were precluded from considering such factors in adopting NAAQS.

In addition, before commencing a NAAQS rulemaking, EPA must issue information on costs. Section 108(b)(1), 42 U.S.C. § 7408(b)(1). The only possible purpose of such a requirement is to enable commenters to critique EPA's cost assessment in the NAAQS rulemaking proceeding.

5. In practice, it is impossible to set NAAQS by reference to health alone.

In practical fact, NAAQS under the Clean Air Act are often set with regard to non-health factors, whether explicitly or not. Neither science nor health considerations alone can definitively determine whether to set a given standard at one level rather than another. For example, in this case, EPA's science advisors concluded that there was no basis for determining a specific threshold level of ozone that would assure protection of public health and welfare. EPA's own scientific experts did not view the agency's decision as purely a health issue, and they did not find the proposed standard to be significantly more protective of public health than the existing standard.[35]

Moreover, the impossibility of excluding factors like costs is underscored by the fact that there is a continuum of health effects associated with many pollutants. EPA has conceded, for instance, that there is no threshold level for ozone below which no adverse health effects would be expected to occur.[36] Given the absence of any threshold, consideration of health effects alone logically would lead EPA to setting a standard of zero for ambient pollutant concentrations. For zero is the only level at which there can be assurance of no adverse health effects. Yet EPA has long acknowledged that Congress never intended such an absurd result.

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[35] The CASAC stated "that there is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public health" and that "the selection of a specific level and number of allowable exceedances is a policy judgment." 62 Fed. Reg. at 38,862. The CASAC observed that "the differences in the percent of outdoor children . . . responding between the present standard and the most stringent proposal . . . are small and their ranges overlap for all health endpoints." *Id.*

[36] See Final Rule, 62 Fed. Reg. at 38,863 ("[I]n the absence of any discernable threshold, it is not possible to select a level below which absolutely no effects are likely to occur. Nor does it seem possible, in the Administrator's judgment, to identify a level at which it can be concluded with confidence that no 'adverse' effects are likely to occur.").

Instead of admitting to explicit consideration of costs and risk trade-offs, EPA purported to set the ozone standard based solely on "public health policy judgments in addition to determinations of a strictly scientific nature." Final Rule, 62 Fed. Reg. at 38,863 (citation omitted). EPA insisted that, because its decision was "largely judgmental in nature," it "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." *Id.* at 38,883.

The invocation of the vague "policy judgments" label simply masks the exercise of the agency's discretion and ensures that its decisions are neither publicly accountable nor subject to meaningful judicial review. Rather than supporting EPA's construction of the statute, EPA's defense demonstrates that the agency operates by pragmatically considering factors such as costs – but in an unreviewable, back-door fashion.

B. The Applicable "Clear Statement" Rule Requires Consideration of Costs and Risk Trade-Offs

If the text and structure of the Clean Air Act left any doubt, this case would be governed by the principle that, in order to engage in reasoned decisionmaking, a federal agency is *required* to consider costs and risk trade-offs in the absence of an express congressional statement *forbidding* the agency from doing so. An agency which is *permitted* to consider costs and risk trade-offs is acting arbitrarily unless it *actually does consider* them. The agency must also give a reasoned explanation of how it considered those factors.[37]

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[37] It does not follow, of course, that it would necessarily be irrational to the point of unconstitutionality for Congress itself to withhold cost-weighing authority from a given agency in a particular setting, having perhaps considered costs itself or assigned that task to another agency with coordinate jurisdiction. The principle we urge upon the Court is the more modest one that, *unless* Congress has clearly excluded consideration of costs from a given agency's decisionmaking process, such consideration must be deemed to fall within that agency's authority, and the agency's refusal in *those* circumstances to take costs into account is arbitrary and capricious, in violation of the APA and the agency's own organic statute.

The test for finding that Congress has prohibited consideration of costs and risk trade-offs is stringent: "It is only where there is 'clear congressional intent to preclude consideration of cost' that [courts] find agencies barred from considering costs." *Michigan v. EPA*, 2000 U.S. App. LEXIS 3209, *36 (D.C. Cir. Mar. 3, 2000) (citation omitted).

Thus, in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 655 (1980), a plurality of this Court refused to find that the phrase "significant risk" in § 3(8) of the Occupational Health and Safety Act, 29 U.S.C. § 652(8), precluded consideration of cost. The plurality understood a "significant" risk as something more than a "mathematical straitjacket" and held that "some risks are plainly acceptable and others are plainly unacceptable." *Id.* at 655 (plurality opinion). The plurality withheld judgment on whether the Act required a "reasonable correlation between costs and benefits," *id.* at 615, but OSHA has since interpreted § 3(8) and regulation of "significant risk" to require "cost-effective protective measures" and has set standards with an eye toward "the costs of safety standards [being] reasonably related to their benefits." *See International Union v. OSHA*, 37 F.3d 665, 668-69 (D.C. Cir. 1994) (quoting OSHA's final rule).

In *George E. Warren Corp. v. EPA*, 159 F.3d 616, 622-24 (D.C. Cir. 1998), *reh'g granted*, 164 F.3d 676 (D.C. Cir. 1999), the D.C. Circuit interpreted the statutory scheme for the reformulated gasoline program, which had the "overall goal" of improving air quality and "reducing air pollution." *Id.* at 622. Even though the relevant statutory provision contained no reference to cost, the court held that the effect of a proposed rule on the price and supply of gasoline were relevant factors for EPA to consider. *Id.* at 623.

In *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 2046 (1999), the statute required the FAA to devise a plan for "substantial

restoration of the natural quiet" in the Grand Canyon area. The D.C. Circuit found that the statute did not preclude the FAA's consideration of costs to the air tourism industry in deciding how "substantial" that restoration must be. *See also Irving v. United States*, 162 F.3d 154, 168 n.13 (1st Cir. 1998), *cert. denied*, 120 S. Ct. 47 (1999) ("[Plaintiff] espouses the logic of zero tolerance for any kind of risk. The indiscriminate application of this logic as a guide for policy has met with considerable criticism.. See, e.g., Stephen Breyer, BREAKING THE VICIOUS CIRCLE 11-19 (1993). . . . [C]ourts must be hesitant to impose such a gloss in the absence of an explicit congressional command or proper grant of agency discretion."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 487 (1989) (suggesting an "interpretive principle" drawn from case law that reviewing courts will read statutes as authorizing regulations with benefits at least "roughly commensurate with their costs, unless there is a clear legislative statement to the contrary").

The Clean Air Act does not contain the requisite clear statement prohibiting EPA from considering costs with respect to the establishment of NAAQS. Indeed, Section 101(b) of the Clean Air Act states that the purpose of the Act is "to protect and enhance the quality of the Nation's air resources *so as to promote* the *public health* and *welfare* and the *productive capacity* of its population." 42 U.S.C. § 7401 (emphasis added). The 1990 Amendments included a provision requiring EPA, in consultation with other executive departments, to "conduct a comprehensive analysis of the impact of [the Clean Air] Act on the public health, economy, and environment of the United States." 42 U.S.C. § 7612(a). EPA was directed to "consider the costs, benefits and other effects associated with compliance" with the various provisions in the Act, specifically including the NAAQS. *Id.* Thus, Congress spoke to the requirement to consider costs and benefits in the Act, and EPA was remiss in not doing so.

Section 109 should also be interpreted with reference to the overriding principle that reasoned decisionmaking requires

agency consideration of costs and risk trade-offs – a principle that Congress has repeatedly recognized since the New Deal. Flood Control Act of 1936, ch. 688, 1, 49 Stat. 1570, 1570 (codified as amended at 33 U.S.C. § 701a), for example, directs that projects should be approved if "the benefits to whomsoever they may accrue are in excess of the estimated costs."

Consideration of cost permeates environmental statutes, demonstrating Congress' recognition of the importance of taking economic factors into account. For example, the Toxic Substances Control Act[38] and the Federal Insecticide, Fungicide and Rodenticide Act[39] require EPA to balance costs and benefits in regulating chemicals and pesticides. In the Safe Drinking Water Act Amendments of 1996,[40] Congress required comprehensive risk analysis as well as independent peer review of the scientific bases for EPA action. In the Accountable Pipeline Safety and Partnership Act of 1996,[41] Congress mandated risk management and peer review. In reforming the Delaney Clause, Congress moved away from a zero risk policy regarding food additives.[42]

In addition to these specific statutes, Congress has also generically mandated the systematic consideration of cost and risk trade-offs. For example, the Small Business Regulatory Enforcement Fairness Act of 1996[43] requires EPA to consider and minimize the impacts of its rules on small businesses.

During the enactment of the Consumer Products Safety Act,

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[38] 15 U.S.C. § 2605(c)(1).

[39] 7 U.S.C. § 136(bb).

[40] Pub. L. No. 104-182, 110 Stat. 1613, codified at 42 U.S.C. § 300f et seq (1994 & Supp 1996).

[41] Pub. L. 104-304, 110 Stat. 3793 (1996), codified at 49 U.S.C. § 60101 et seq (1994 & Supp 1996).

[42] Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489, 1514-35, codified at 21 U.S.C. § 346a (1994 & Supp 1996).

[43] Pub. L. No. 104-121, 110 Stat. 857-874 (1996) (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C. and 28 U.S.C.).

House and Senate reports summarized the pattern of congressional action:

> Protection against unreasonable risks is central to many Federal and State safety statutes and the courts have had broad experience in interpreting the term's meaning and application. It is generally expected that the determination of unreasonable hazard will involve the Commission in balancing the probability that risk will result in harm and the gravity of such harm against the effect on the product's utility, cost, and availability to the consumer.

H. R. Rep. No. 92-1153, at 33 (1972); S. Rep. No. 92-749, at 14-15 (1972).

EPA's anomalous construction of Section 109 is out of step with Congress' repeated recognition of the importance of considering costs and risk trade-offs.

C. Administrative Law Principles Require Consideration of Costs and Risk Trade-Offs

The judicial branch is similarly familiar with the need to consider costs and risk trade-offs. The standard of "reasonableness" in tort law requires a court to consider the costs of safety precautions as well as their expected benefits. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.). The common-law doctrine of "nuisance" also entails a balancing inquiry and a consideration of cost. *See* Restatement (Second) of Torts §§ 826-28.

This Court has held that, under principles of administrative law, agencies must conduct a "reasoned analysis" and furnish a "reasoned basis" for their decisions. *Motor Vehicles Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 42, 52, 57 (1983). Numerous decisions have recognized that, to qualify as "reasoned" under this standard, agency action must consider costs and risk trade-offs. In *Corrosion Proof Fittings v. EPA*,

947 F.2d 1201, 1214-15 (5th Cir. 1991), for example, the court of appeals held that EPA, under the Toxic Substances Control Act, could not ban of the use of asbestos in brake linings without considering countervailing risks. The court explained that EPA sought to ban asbestos as a carcinogen, but had considered neither the carcinogenicity of likely substitutes, nor whether traffic accidents might be increased due to reduced brake efficiency. The court held that EPA's refusal to consider the risk of substitutes "deprives its order of a reasonable basis" because "EPA cannot say with any assurance that its regulation will increase workplace safety when it refuses to evaluate the harm that will result from the increased use of substitute products." "[E]ager to douse the dangers of asbestos, the agency inadvertently actually may increase the risk of injury Americans face." *Id.*

Similarly, in *Competitive Enterprise Institute v. NHTSA*, 956 F.2d 321 (D.C. Cir. 1992), the D.C. Circuit held that the National Highway Traffic Safety Administration's automobile fuel efficiency rulemaking was not "reasoned" when the agency focused on the environmental risks of excessive fuel use but failed to consider the countervailing risks posed by smaller and less crash-worthy vehicles. Observing that an agency must supply a "reasoned analysis" for its decision, the court of appeals held that NHTSA had failed to confront the requisite trade-off. The defect was "not . . . NHTSA's judgment call, but . . . NHTSA's attempt to paper over the need to make a call." *Id.* at 323.

Courts construing regulatory statutes have recognized the need for agencies to consider costs and risk trade-offs. In *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490 (1981), this Court refused to interpret the Occupational Health and Safety Act as requiring absolute safety. To the contrary, this Court recognized that "Congress was concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and therefore insisted that health and safety goals be capable of economic and technological accomplishment." *Id.* at 514. In upholding the OSHA cotton

dust standard, this Court noted that "OSHA presented a 'responsible prediction' of what its Standard would cost and its impact on 'production, employment, competition, and prices.'" *Id.* at 531.

Subsequently, the D.C. Circuit upheld an interpretation of another provision of the OSH Act as entailing explicit cost-benefit analysis: "Cost-benefit analysis requires identifying values for lost years of human life and for suffering and other losses from non-fatal injuries. . . . Thus, cost-benefit analysis entails only a systematic weighing of pros and cons, or what Benjamin Franklin referred to as a 'moral or prudential algebra.'" *United Auto Workers v. OSHA*, 938 F.2d 1310, 1320-21 (D.C. Cir. 1991).

In *Forester v. Consumer Product Safety Commission*, 559 F.2d 774 (D.C. Cir. 1977), the court of appeals defined "unreasonable risk" in the Federal Hazardous Substances Act, 15 U.S.C. § 1261(s), as involving "a balancing test like that familiar in tort law: The regulation may issue if the severity of the injury that may result from the product, factored by the likelihood of the injury, offsets the harm the regulation itself imposes upon manufacturers and consumers." *Id.* at 789; *see also Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm'n*, 569 F.2d 831, 844 (5th Cir. 1978) (vacating agency action because "the Commission has a duty to take a hard look, not only at the nature and severity of the risk, but also at the potential the standard has for reducing the severity or frequency of the injury, and the effect the standard would have on the utility, cost or availability of the product").

In *Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981), the court of appeals reviewed an Interstate Commerce Commission adjudication of shippers' claims that a rate based on the expense of certain safety precautions was not "reasonable," because the precautions themselves were excessive. The court explained that the ICC was bound to consider costs in setting safety rules:

> The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their cost; and second, that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit.

Id. at 648.

EPA's action in this case should be held invalid under both the Clean Air Act and the APA. Decisionmaking that ignores costs and risk tradeoffs should be held violative of the underlying regulatory statute and should also be deemed "arbitrary and capricious" under the APA, 5 U.S.C. § 706.

CONCLUSION

The decision of the Court of Appeals should be reversed to the extent it held that EPA was not required to consider (and in fact was precluded from considering) non-health factors, including the costs of compliance and risk trade-offs. The case should be remanded for application of a proper construction of the Clean Air Act.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* MERCATUS CENTER IN SUPPORT OF CROSS-PETITIONER

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BRIEF OF *AMICUS CURIAE* MERCATUS CENTER IN SUPPORT OF CROSS-PETITIONER

INTEREST OF *AMICUS CURIAE*

The Mercatus Center at George Mason University is a nonprofit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3).[1] Its Regulatory Studies Program ("*RSP*") is

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[1] The statements in this brief do not represent an official position of George Mason University. The parties' written consents to the filing of this brief have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to its preparation or submission. Counsel acknowledge the contribution of Susan E. Dudley, Senior Research Fellow at the Mercatus Center, to the writing of this brief.

dedicated to advancing knowledge of administrative regulations and their effects on society. Through its Public Interest Comment project, RSP submits independent analyses of proposed rules in agency rulemaking proceedings. It filed two such analyses with EPA on the proposed national ambient air quality standards for ozone and particulate matter during the comment period. Those comments focused on the inadequacy of the scientific and economic foundation of the proposed standards, the failure of EPA to consider offsetting health risks and the disproportionate costs that would be incurred in implementing the standards. Each is central to the issue of the petition herein.

ARGUMENT

I. INTRODUCTION AND BACKGROUND

The issue in this case is whether the EPA and the lower court correctly construed the Clean Air Act ("CAA") when they relied upon *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980), to exclude indirect health effects, implementation costs, and related risk considerations in setting National Ambient Air Quality Standards ("*NAAQS*"). Section 109(b) of the CAA directs EPA to set NAAQS at levels "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). In *Lead Industries*, the D.C. Circuit held that § 109 prohibited EPA from considering "economic or technological feasibility in setting ambient air quality standards." 647 F.2d at 1148. It specifically rejected arguments that cost considerations were relevant in establishing "margins of safety" under § 109 or that EPA had to show "clear" health effects before approving standards for protecting "public health." *Id.* at 1154-1155; see *id.* at 1148. Later decisions by the D.C. Circuit confirmed that EPA was precluded from considering all factors of " 'economic and technological feasibility,' " *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert. denied sub nom. *American Petroleum Inst. v. Gorsuch*, 455 U.S. 1034 (1982), including indirect health effects such as "costs associated with alleged health risks from unemployment." *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), vacated in part, 921 F.2d 326 (D.C. Cir.), cert. dismissed sub nom. *Alabama Power Co. v. NRDC*, 498 U.S. 1075 (1991).

This unduly narrow reading of § 109 is not supported by the CAA's text, purpose, context, structure or legislative history—or by common sense. It is, moreover, inconsistent with the D.C. Circuit's reading of a significant part of §112(b)(1)(B) of the CAA, 42 U.S.C. § 7412(b)(1)(B), which established the boundaries for hazardous pollutants "at the level which in the [Administrator's] judgment provides an ample margin of safety to protect the public health." In *NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*) ("*Vinyl Chloride*"), the D.C. Circuit read § 112 as requiring an EPA finding of "significant risk," *id.* at 1153, and as permitting consideration of non-health as well as compliance costs and related matters in setting the emissions standards. *Id.* at 1158, 1163-66. Thus, had the open-ended measure of standard setting approved in *Vinyl Chloride* been adopted by EPA and the D.C. Circuit in the instant case (rather than the health restricted test of *Lead Industries*), it is unlikely that this case or its companion, Docket No. 99-1257, would be before the Court. That is, under that test, EPA's discretion would not have been largely unconfined, the requirements of the nondelegation doctrine could have been satisfied, and a NAAQS standard that properly took into account all relevant factors, including implementation costs, could have been adopted.[2]

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[2] The difference in the language of the two sections – "adequate" in § 109 and "ample" in § 112 – would have seemingly no impact on whether cost and other factors were appropriate considerations in setting pollutant levels. At most, these differences measure the quantum but not

These issues of statutory construction under § 109 are persuasively addressed in Cross-Petitioners' brief and we endorse but do not repeat that analysis here.[3] Our focus instead is on the effect of EPA's misguided reading of the clause in § 109—that NAAQS levels for ozone and particulate matter must "protect the public health" with an "adequate margin of safety." Because EPA's reading excludes consideration of important countervailing health and welfare considerations (e.g., implementation costs as well as direct and indirect health and welfare effects), the revised NAAQS are unlikely to improve public health and welfare. We examine the public health and welfare effects of different decision rules that could be applied if EPA were not constrained by *Lead Industries*, and show that these alternative decision rules would better meet the statutory directive of protecting public health with an adequate margin of safety.

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the kind of analytical support required for these EPA rules. See *Merriam-Webster's Collegiate Dictionary* 61 (Deluxe ed. 1998) ("ample" is something "more than adequate").

[3] Amicus also is filing a brief in the companion "nondelegation" case (Docket No. 99-1257) on the proper application of that doctrine in interpreting § 109 of the CAA. Nonetheless, we believe that the issue there is interconnected with the "substantive *Lead Industries*" case here (Docket No. 99-1426) because a proper reading of § 109, requiring EPA to consider cost, indirect health and related effects, will moot the nondelegation issues in Docket No. 99-1257. On the other hand, affirmance of the court of appeals in the nondelegation case (Docket No. 99-1257) will not resolve the substantive *Lead Industries* issues herein because rejection of EPA's interpretation of § 109 does not itself answer the question of Congressional intent on the meaning of that section. That question should be answered either by the Court (under *Chevron* step 1) or by a reasonable interpretation by the agency (under *Chevron* step 2), depending on whether Congress directly addressed the precise issues of cost consideration. See pp. 23-4 *infra*.

The revised NAAQS rules at issue here represent a major departure by EPA. Its prior standard for PM regulated all particles larger than 10 microns; the revised standard expands that regulatory scope by including fine particles of soot down to 2.5 microns, which "are so small that several thousand of them could fit on the type-written period of the end of a sentence." Statement of EPA Administrator Carol M. Browner before Senate Subcommittee on Clean Air, Wetlands, Private Property & Nuclear Safety of the Comm. on Environment & Public Works, 105th Cong., 1st Sess. 280 (Feb. 12, 1997). The new rule generally retains the 1987 standards for particulate matter larger than 10 microns (PM_{10}) but creates a new standard for fine particles larger than 2.5 microns ($PM_{2.5}$). The $PM_{2.5}$ standard specifies a maximum annual average concentration of 15 and a daily maximum of 65 micrograms per cubic meter, summarized as 15/65 $\mu g/m^3$. The previous ozone standard applied to concentrations of .12 parts per million (ppm) averaged over one hour; the new rule sets it at .08 ppm averaged over eight hours which constitutes roughly a 10 percent reduction.[4] While implementation cost estimates are necessarily imprecise, responsible reviewers put total annual compliance costs for the two standards between $46.3 billion (EPA's estimate) and $210 billion (Reason Public Policy Institute upper bound estimate); the Mercatus Center estimated implementation costs to be at least $100 billion annually. See discussion pp. 19 n.14, 20 & 22 n.16 *infra*.

EPA acknowledged that its selection of ozone and PM levels—at .08 ppm for ozone and 15/65 $\mu g/m^3$ for $PM_{2.5}$—was not based on scientific evidence establishing a safe threshold for ozone or PM health effects. Indeed, the announced standards start from the assumption that there is

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[4] The rule notes that an eight-hour standard of .09 ppm "generally represents the continuation of the present level of protection." NAAQS Ozone Rule, 62 Fed. Reg. 38,856, 38,858 (July 18, 1997)("*Ozone Rule*").

no safe threshold below which ozone and PM would not pose adverse health effects.[5] EPA therefore relied upon a "linear, nonthreshold dose-response model" to evaluate the benefits of each further reduction in ozone and PM.[6] However, under this model. each further reduction in ozone and PM will be found to improve public health (i.e., provide life-saving benefits) no matter how "clean" the air already may be. Thus, there is no standard above zero that could be said to be "safe" or said not to cause adverse health effects.

Nonetheless, EPA did not set either standard at zero. It understood, at least implicitly, that zero concentration levels were technically infeasible, and that even if achievable, such standards would impose severe economic and other costs that dwarfed all possible benefits. *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1038 & n.4 (D.C. Cir. 1999). Fettered by *Lead Industries*, however, EPA could not assert that the costs of setting the standards at zero would outweigh their benefits.[7] EPA did not explain how or why it selected

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[5] For PM, EPA suggests that a threshold may exist, but "the level or even existence of population thresholds below which no effects occur cannot be reliably determined by an examination of the results from the available studies." NAAQS PM Rule, 62 Fed. Reg. 38,652, 38,670 (July 18, 1997)("*PM Rule*").

[6] The linear, nonthreshold dose-response model that EPA used to support its analysis relates the predicted change in health effects to a change in the concentration of PM or ozone. Unlike other chemicals regulated by EPA under this section of the CAA, EPA has no scientific evidence of a threshold concentration below which PM or ozone will not have health effects. This is the *nonthreshold* aspect of the model. The *linear* aspect of the model assumes that regardless of the overall concentration of ozone or PM to which an individual is exposed, a one unit change in that concentration will have the same marginal effect on public health.

[7] We use the terms "costs" and "benefits" here in their broadest senses and include among them "risk" and "cost-benefit" analyses as well as "wealth-health" and "health-health" effects (discussed pp. 12-23 *infra*).

the .08 ppm (ozone) or 15/65 $\mu g/m^3$ ($PM_{2.5}$) levels as compared with any other levels, and thus it did not identify a principled basis for determining what concentrations of ozone and PM in the atmosphere are adequate to protect public health. This narrowly constrained decision structure, which did not consider trade-offs between different health effects, the cost of implementing a standard, or the health effects of large compliance costs, conflicts with CAA § 101(b). That section expressly identifies "promot[ing] the public health and welfare and the productive capacity of its population" as one of the primary purposes of the Clean Air Act. 42 U.S.C. § 7401(b)(1).

Confined by *Lead Industries*, EPA was forced to produce an alternative, non-cost basis for the new ozone and PM levels. As that alternative, it chose unbridled and essentially unreviewable administrative discretion, asserting that selecting the "adequate margin of safety" was "a policy choice left specifically to the Administrator's judgment." *Ozone Rule*, 62 Fed Reg. at 38,857; see also *PM Rule*, 62 Fed. Reg. at 38,653. Thus, according to EPA, it is free under CAA § 109 to select any point along a dose-response continuum and claim that this point provides an adequate margin of safety without regard to whether that margin could be satisfied at a less stringent level or whether a more stringent level was necessary.

II. THE OZONE AND PARTICULATE MATTER RULES ARE BASED ON UNCERTAIN EVIDENCE THAT DOES NOT JUSTIFY THE SELECTED NAAQS LEVELS

EPA's own science advisors questioned whether its ozone and PM standards would achieve EPA's claimed public health benefits. This uncertainty, when coupled with large implementation costs, caused both outside experts and other agencies within the government to question whether the air

quality concentration levels established by the standards were justified. See, e.g., Letter from Frank E. Kruesi, Assistant Secretary for Transportation Policy, to Sally Katzen, Office of Information and Regulatory Affairs, Office of Management and Budget (Nov. 20, 1996)("It appears incomprehensible that the Administration would commit to a new set of standards and new efforts to meet such standards without much greater understanding of the problem and its solutions.").

A. EPA Failed to Develop Comparative Justifications for the New NAAQS Levels

The indeterminate nature of EPA's supporting evidence for its new standards was fostered by the narrowness of *Lead Industries'* direct health test. That is, forced to consider only direct health measures (e.g., lung function) and prohibited from considering indirect health effects (e.g., protection against ultraviolet radiation) or compliance costs (e.g., cost-benefit comparisons), the EPA failed to develop any justification for the specific levels selected in its NAAQS standards. In particular, EPA was unable to explain why the levels it selected, for example, of $PM_{2.5}$ at 15/65 $\mu g/m^3$, were appropriate as compared with any alternative such as a $PM_{2.5}$ level of 20/75 $\mu g/m^3$.

1. Ozone

The human clinical, epidemiological, and animal evidence relied upon by EPA to support its more stringent ozone standard does not explain why the level was set at .08 ppm and not .07 or .09, or indeed at any point between the current level and zero. The clinical studies of individuals running on a treadmill detected changes in the force of exhalation of persons exposed to ozone only at levels down to .08 ppm. *Ozone Rule*, 62 Fed. Reg. at 38,859 & 38,863. Not only were these measured responses "typically small or mild in nature,"

id. at 38,864, but also the effects were temporary and reversible. More importantly, these studies did not examine effects at levels lower than the proposed new standard of .08 ppm, and EPA did not distinguish between lung function effects at .08 ppm and higher levels. *Id.* at 38,863-64.

Nor were these gaps filled by epidemiological studies. In evaluating the effects of ozone, EPA reviewed studies correlating high ozone concentrations and above normal hospital admissions. *Id.* at 38,864. But as EPA admits, these ozone hospital admissions only "represent a small fraction of the total respiratory-related hospital admissions for asthmatics" and provide no support for the particular ozone standards of .08 because the studies report "no discernable threshold at or below this level." *Id.* Long-term laboratory animal studies referenced by EPA did not fill this gap. While subsequent dissection revealed changes in the biochemistry and structure of the lungs, the animal studies showed no change in behavior or function of the lungs at exposures significantly higher than .08 ppm (.5 ppm to 1.0 ppm). 61 Fed. Reg. 65,715, 65,721 (Dec. 13, 1996). Indeed, at the lowest exposure level examined of .12 ppm, animal studies showed no effects at all. *Id.*

The issue here is not whether there is scientific evidence to support restrictions on ozone, but rather the absence of any evidence showing why the .08 ppm standard is a correct or reasonable level, or why a lower or higher level is not better. Because of *Lead Industries*, EPA was not forced to provide comparative evidence or consider other health or cost effects that reduced the identified benefits from the new standard or that offered a basis for a selected stopping point. This unfocused state of the supporting evidence is even more significant because EPA's highly regarded Clean Air

Scientific Advisory Committee ("CASAC")[8] did not endorse the .08 ppm ozone standard. In giving advice to the EPA Administrator, the CASAC explained that "there is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public health" than the existing standard. CASAC Letter to Carol Browner *re: Ozone* (November 30, 1995) in Ozone JA 238.[9]

2. PM

The support for the $PM_{2.5}$ standard similarly fails to identify why the new standard of 15/65 $\mu g/m^3$ rather than 20/75 (or 12.5/20) was selected. Here there was a broad consensus among CASAC members that available studies supported the establishment of a standard for $PM_{2.5}$; but there was "no consensus on the level, averaging time or form of a $PM_{2.5}$ NAAQS." CASAC Letter to Carol Browner *re: Particulate Matter* (June 13, 1996) ("*CASAC Letter*") in PM JA 3164. In other words, EPA's science advisors agreed that fine particles warrant concern but the threat they present at this time is too poorly understood to justify selection of any particular level, or at least not a level of 15/65 $\mu g/m^3$. Thus, in his testimony before the Subcommittee on Clean Air, Wetlands, Private Property & Nuclear Safety of the Senate Committee on Environment & Public Works, 105th Cong., 1st Sess. 18 (Feb. 5, 1997), the chairman of CASAC, Dr. George T. Wolff, emphasized the "many unanswered

[8] CASAC is a legislatively established body of independent experts that provides advice to EPA on scientific and engineering issues. See 42 U.S.C. § 7409(d)(2)(A).

[9] CASAC concurred (unanimously) that a measure of ozone that focused on concentrations over an 8-hour period would be more appropriate than the prior standard which measured concentrations over a 1-hour period. EPA states that the prior standard of .12 ppm measured over 1 hour is equivalent to a standard of .09 ppm measured over 8 hours.

questions and uncertainties" left open by EPA's supporting evidence—e.g., which fine particles are hazardous, how to interpret observed correlations between health effects and PM—and concluded that it was impossible to rely upon health effects as the sole basis for selecting any standard.

EPA was unable to identify the sources of particulates which would need to be controlled if its regulations are to have any beneficial effects on public health. The prepared statement of CASAC Chair Dr. Wolff explained the problem:

> PM_{10} and $PM_{2.5}$ . . . are composed of four or five major constituents and hundreds of trace constituents . . . . The causative agent [of adverse public health effects] could be some constituent of the PM rather than the total PM or total $PM_{2.5}$ which would require a control strategy targeted at the causative constituent rather than at PM_{10} or $PM_{2.5}$ in general. . . . There is no biologically plausible mechanism that could explain the apparent relationship between acute mortality and PM at concentrations that are a fraction of the present PM_{10} NAAQS. (*Id.* at 92-93.)

In brief, EPA's official science advisors concluded with near unanimity that the agency had not obtained critical missing support for the level of its $PM_{2.5}$ rule. See *CASAC Letter*, PM JA at 3165 ("[t]he Panel is unanimous . . . in its desire to avoid being in a similar situation [of too little data with too little time to evaluate and integrate it] when the next PM NAAQS review cycle is under way by a future CASAC Panel").

B. The Consideration of Other Factors Such as Comparative Costs and Benefits is Necessary for Developing Reliable and Specific Standards

Forced to rely only upon direct evidence of adverse public health effects in setting specific standards, EPA was left in a

quandary as to how to develop and support particular levels without being forced to select a zero standard. EPA clearly considered tradeoffs when it chose to set a non-zero standard, but it was not allowed to consider those trade-offs openly or to use all the tools required for rational decision making. If a reduction in ozone has harmful side effects (e.g., reducing the protection from ultraviolet rays, see pp.15-17 *infra*), that information is critical in deciding whether and where to set the standard. If the cost of reducing ozone and small particles includes an increase in the number of asthma cases and more deaths than lives saved, particularly among vulnerable groups such as the urban poor, see pp. 17-19 *infra*, that information should encourage setting the standard at a level that can be achieved at more reasonable cost. How EPA's decision is made—and, in particular, what information can be considered and relied upon—is critical to whether the CAA's objective of both improving public health and increasing productive capacity will be achieved. 42 U.S.C. § 7401(b)(1).

III. BECAUSE OF *LEAD INDUSTRIES*, EPA DECISION-MAKING IGNORED HEALTH AND WEALTH TRADE-OFFS AND FAILED TO EXAMINE COST CONSEQUENCES

In directing EPA to develop ambient air standards under CAA § 109, Congress intended that when setting NAAQS levels the agency should take account of all factors that could impinge on public health. *See* Cross-Pet. Br. Part II (examining language, structure, context, purpose and legislative history of § 109). The ruling in *Lead Industries*, that cost-benefit analysis was not permissible and that only direct health effects of the pollutant being regulated could be considered, has thwarted the Congressional purpose. The D.C. Circuit's undue narrowing of EPA's decision process has meant that cost, feasibility, indirect health and wealth effects—all of which are integral parts of public health policy

analysis—were not included. See generally Susan E. Dudley & Wendy L. Gramm, *EPA's Proposed Ozone Standard May Harm Public Health and Welfare*, 17 Int'l J. Risk Analysis 403 (1997); Edward W. Warren & Gary E. Marchant, *"More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts*, 20 Ecol. L. Q. 379 (1993); cf. Presidential/Congressional Commission on Risk Assessment and Risk Management, *Framework for Environmental Health Risk Management*, vol. I at 38 (1997).

As the lower court demonstrated, EPA could have relied upon a determinate decision rule that would eradicate "any hint of direct health risk" by setting NAAQS levels at zero for ozone and PM.[10] Cert. Pet. App. (Docket No. 99-1257) at 15a. But such a rule requiring "deindustrialization" was rejected out of hand by EPA. As a consequence, EPA was left with no guiding decision standard other than the Administrator's subjective "policy judgment." 62 Fed. Reg. at 38,869 (ozone rule); *id.* at 38,691 (PM rule); see also Testimony of George T. Wolff, *supra* at 17. This, the lower court said, would violate the constitutional requirement that the NAAQS standards set by EPA be based on some determinate decision rule. Cert. Pet. App. (Docket No. 99-1257) at 6a. The court further noted that "[e]veryday life compels us all to make decisions balancing remote but severe harms against a probability distribution of benefits," *id.* at 16a, and suggested that EPA could develop a "generic unit of harm" and determine how many such units are permissible under the CAA in setting NAAQS standards. *Id.*

By definition, the balancing decisions made in everyday life involve weighing the positive consequences of an action against the negative consequences. Applied here, such a

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[10] An application of the "direct health effects" test in *Lead Industries* would not have had the same consequences because lead was believed to have a non-zero threshold—i.e., there were concentrations below which no adverse health effects were found.

balancing would require that all factors be considered, not just the negative health effects of pollutants in the air. To guide that judgment the CAA should be read as permitting cost-benefit analysis. Cost-benefit is merely a "regulatory method that calls for regulators to identify, and make relevant for purposes of decision, the good effects and the bad effects of regulation, and to quantify those as much as possible in terms of both dollar equivalents and life-years saved, hospital admissions prevented, workdays gained, and so forth." Cass R. Sunstein, *Cognition and Cost-Benefit Analysis* p. 9, Univ. Chi. Law & Economics Working Paper No. 85 (2d. Series) (October 1999) (forthcoming J. Legal Studies) <http://www.law.uchicago.edu/Publications/Working/index/html>.[11] Indeed, former EPA officials acknowledge that the use of benefit-cost analysis at the beginning of the regulatory process has led to significantly increased benefits and reduced costs in the affected regulations. See Richard D. Morgenstern, *Economic Analyses at EPA: Assessing Regulatory Impact* 2-3, 473-74 (Resources for the Future 1997) (former Associate Assistant Administrator, EPA Office of Policy Analysis).

Only by balancing the positive benefits of reducing ozone and PM against offsetting negative consequences of achieving those reductions can EPA find an "intelligible principle" on which to base its standards. This section offers several balancing criteria applicable in that process. It begins with health criteria and goes on to examine increasingly broad decision rules to conclude that the statutory goals

[11] See also C. Boyden Gray, *The Clean Air Act Under Regulatory Reform*, 11 Tul. Env. L. J. 235, 260 (1998): "Making open and accountable use of economic incentives and the law of diminishing returns, as well as demanding that there be benefits to the public from a rule net of any offsetting side-effects or dis-benefits, would . . . produce more expansive air quality benefits, because costs saved in implementation can be redirected to providing benefits."

protecting public health and welfare are best promoted with an open balancing of benefits and costs.

A. Health-Health Effects

EPA constrained its public health policy judgments to preclude not only costs but many other factors that affect public health, including other health effects. This single-focus analysis violated basic risk management principles. "Considering a risk in isolation cannot provide decision-makers or the public with any sense of how important the risk is, compared with other risks, or of the impact that reducing or eliminating it might have on overall human and ecosystem health." Presidential/Congressional Commission on Risk Assessment and Risk Management, *supra* at 38.

Had EPA engaged in a more complete analysis, it seems clear that it would have been obliged to set the ozone standard at a different level.[12] In estimating the effects and deciding the appropriate levels of permissible ozone concentrations, EPA explicitly disregarded its own evidence as well as evidence presented by other agencies that reducing ground-level ozone to the EPA levels could reduce ozone's screening effect on harmful ultraviolet-B ("UV-B") radiation and lead to thousands of additional skin cancer and cataract cases per year. See EPA, *Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers* (Draft)(September 1994)(Cupitt, Larry T.) in Ozone JA 3089-3104; Randall Lutter & Christopher Wolz,

[12] The lower court unanimously reversed EPA's explicit disregard of potential beneficial health effects of tropospheric (ground-level) ozone, finding it a "bizarre" reading of the CAA to force EPA to "look[] at only one half of a substance's health effects in determining the maximum level for that substance." Cert. Pet. App. (Docket No. 99-1257) at 47a. EPA did not seek certiorari on this issue and, as a consequence, must go through notice-and-comment rulemaking to address the evidence that lowering the ozone NAAQS may have a negative net health effect.

UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standard, Environmental Science & Technology, Vol. 31, No. 3 (1997). For example, evidence in the record submitted by the Department of Energy projected that a .01 ppm reduction in ozone concentrations, as required by EPA's ozone rule, would result in 25 to 50 additional melanoma-caused fatalities, 130-260 additional incidences of cutaneous melanoma, 2,000-11,000 additional cases of non-melanoma skin cancer, and 13,000-28,000 additional incidences of cataracts each year. Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995) in Ozone JA 258-59. Critically, these negative results from lowered ozone concentrations dwarfed EPA's projected positive health effects. Since none of the evidence reviewed by EPA's science advisors suggested that implementation of EPA's stricter ozone rule would reduce human fatalities, the loss of protective health benefits from current ozone levels under the new rules would outweigh any health benefits that could be gained from reduced ozone levels. See Susan E. Dudley & Wendy L. Gramm, *supra* at 404:

> [The Department of Energy's analysis] suggests the rule will induce 25-50 more fatalities each year (since EPA's best estimate of the health benefits of the new standard do not include any reduced fatalities). To compare the morbidity effects, we used EPA approaches to convert health effects to dollars. We estimate that the negative health impacts from this rule will exceed EPA's best estimate of the positive health effects by over $300 million per year.

Particulate matter also serves a beneficial screening function against harmful UV-B radiation, although these benefits, by themselves, do not outweigh the positive health effects resulting from reductions in PM. Nonetheless, it is unsound public policy and contrary to the CAA's requirements to ignore the positive health effects of PM in

setting a standard designed to protect public health with an adequate margin of safety. But that appears to be how EPA proceeded here because of *Lead Industries*.

In its Advance Notice of Proposed Rulemaking for the Ozone and PM standards 61 Fed. Reg. 65,764, 65,768 (Dec. 13, 1996), EPA described another unwelcome side effect of reducing PM. It cautioned that "a reduction of a fine particle precursor possibly can increase ozone or increase a different fine particle component (e.g., SO_x reductions leading to increased ammonium nitrate or NO_x reductions increasing sulfate formation)." In other words, EPA recognized that the reduction of fine particles as required by its $PM_{2.5}$ NAAQS standard could increase emissions of other pollutants that may have harmful health effects.

While consideration of health-health tradeoffs increases the likelihood that public health will, on balance, be protected, this methodology does not identify any specific standard (or "intelligible principle"). For example, if the dose-response function for both the beneficial UV-B effects and the detrimental ozone or PM health effects are linear, and do not exhibit a threshold, then a health-health decision rule will drive the standard to zero in order to minimize levels of the pollutant if the detrimental effects dominate (as may be the case for PM) or lead EPA not to regulate the pollutant at all if the beneficial effects dominate (as may be the case for ozone). Nonetheless, considering offsetting direct health costs associated with a rule is essential if EPA is to optimize public health.

B. Wealth-Health Effects

Just as both harmful and beneficial health affects should be considered in determining whether a NAAQS standard satisfies the public health standard in § 109, similar consideration should be given to the costs of implementing

EPA rules and of their effect on disposable family income. A body of research indicates that serious health problems arise when family living standards decline. See Stephen J. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 23 (1993) ("deprivation of real income itself has adverse health effects, in the form of poorer diet, more heart attacks, more suicides").[13]

The "wealth-health" decision rule translates such costs into statistical deaths and counsels against imposing regulations that are projected to cause a greater number of deaths (through lower income) than they prevent. See Randall Lutter & John F. Morrall, *Health-Health Analysis: A New Way to Evaluate Health and Safety Regulation*, 8 J. Risk & Uncertainty 43-66 (1994); Ralph L. Keeney, *Estimating Fatalities Induced by the Economic Costs of Regulations*, 14 J. Risk & Uncertainty 5 (1997). Recent studies linking income and mortality find that every $15 million decline in net income induces one statistical death. See Randall Lutter, John F. Morrall, III, & W. Kip Viscusi, *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 Economic Inquiry 599-608 (October 1999). The total number of additional deaths attributable to the adverse wealth effects of the ozone and PM rules ranges from 665 to 4,050 for the ozone rule and 2,447 to 10,000 for the PM rule. Against these numbers, EPA estimates that the ozone rule will prevent 350 fatalities and the PM rule another 3,300 to 16,000. In other words, 315 to 3,700 additional deaths will occur under

[13] Recent studies also suggest that poverty may be a more important risk factor for asthma (which is the main health focus of the ozone and PM rules) than air quality, so the extraordinary cost of these rules may increase poverty—and thereby increase the very disease they are targeted to diminish. See American Thoracic Society, *Asthma on the Rise in Urban Areas*, 1996 International Conference Articles (1996) <http://www.thoracic.org/ic/ic96/mon4.html> ("Poverty may be the number one risk factor for asthma.").

the ozone rule, while more lives will be saved than lost under the PM rule.[14]

This analysis emphasizes the problems inherent in narrowly constricting the factors that EPA can rely upon in shaping and approving rules under the CAA. The NAAQS regulations cannot be accurately assayed without including the positive health benefits from ozone and PM as well as the consequences of reducing consumer wealth and therefore of increasing mortality.

C. Cost-Benefit Analysis

Proper application of health-health and wealth-health effects are important in the design of rational NAAQS rules. They nonetheless are limited tools. A full analysis of the public health consequences of a major environmental rule seeking to improve air quality must assess all the costs as

[14] Estimates of the annual cost of EPA's new ozone and PM rules range widely. EPA estimated that the total will be $46.3 billion per year ($9.6 billion for ozone and $36.7 billion for PM). See EPA, *Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Hazard Rule* 9-7 (July 16, 1997) <http://www.epa.gov/ttn/oarpg/naaqsfin/ria.html> ("*RIA*"). The 1997 Mercatus Center analysis estimated that the full costs could exceed $100 billion per year. Mercatus Center, *Comments on NAAQS for PM*, RSP 1997-1 at 17 (March 12, 1997); Mercatus Center, *Comments on NAAQS for Ozone*, RSP 1997-2 at C-3 (March 12, 1997). And a Reason Public Policy Institute study estimated these costs as ranging from $20 billion to $60 billion per year for the ozone rule, and $70 to $150 billion per year for the PM rule. Anne E. Smith, et al., *Costs, Economic Impacts, and Benefits of EPA's Ozone and Particulate Standards*, Reason Public Policy Institute 15 (June 1997) ("*RPPI*"). Using the $15 million income-health relationship, EPA's cost estimate would imply an increase in mortality of 3,087 deaths each year. The RPPI's estimates translate into additional annual fatalities of 1,333 to 4,000 for the ozone rule and 4,667 to 10,000 for PM. To these numbers one also must add the 25-50 melanoma deaths noted earlier (p. 16 *supra*) that are attributable to increased UV-B exposure because of reductions in ozone levels.

well as benefits of the intended regulation. The principle is widely recognized and imbedded in agency rulemaking subject to Presidential oversight. See, e.g., Executive Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (even though "some costs and benefits are difficult to quantify, [agencies shall] propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"). A cost-benefit analysis is simply a comprehensive way of ensuring that a regulation does more good than harm. See, e.g., Kenneth J. Arrow, et al., *Is There a Role for Benefit-Cost Analysis in Environmental, Health and Safety Regulation?*, 272 Science 221 (1996); see also Edward W. Warren & Gary E. Marchant, *supra*. To deny an agency the authority to examine all benefits and costs—whether focused on economic trade-offs, comparing risks, evaluating technical requirements, analyzing feasibility, or assessing other opportunity costs—is to consign its regulations to weak and unsatisfactory justifications.

EPA did conduct a Regulatory Impact Analysis that estimated the benefits and costs of the standards (in one year, 2010), although it argued that this information was "not relevant to establishing the standards themselves." *RIA* at ES-3. EPA concluded that the cost of fully attaining the ozone standard would be $9.6 billion and the benefits could range from $1.5 billion to $8.5 billion in 2010. Thus, under EPA's estimate the ozone rule would impose costs in excess of benefits of between $1.1 billion and $8.1 billion per year. Meeting the PM standard in 2010, according to EPA's estimates, would cost $36.7 billion, and offer benefits ranging from $19.8 billion to $109.7 billion. *RIA* at 13-2. EPA thus estimated that the net effect of achieving the PM standard in 2010 could range from net costs of $18 billion to net benefits of $67 billion.

By EPA's own analysis, the ozone rule clearly fails a cost-benefit test, while the PM rule fails under certain

assumptions. Furthermore, EPA's estimates have been criticized as overstating benefits and understating costs. The benefits figures are dominated by statistical deaths avoided which, according to EPA's approach, are valued at $4.8 million each; but this figure "significantly overstates the value most people would attach to the average number of life years saved (per person) by the [Clean Air Act]." Advisory Council on Clean Air Compliance Analysis Letter to EPA (October 23, 1996), docketed as EPA-SAB-Council-ltr-97-001<http://www.gov/science1/coul9701.pdf>; see National Research Council, *Paying Our Way: Estimating Marginal Social Costs of Freight Transportation*, TRB Special Report #246, at 159 (1996) ("12 years are lost on average by a person who dies prematurely as a result of air pollution"). Furthermore, the relationship between these pollutants and mortality itself is in question. CASAC did not review the studies EPA relied upon for the ozone mortality effects, *RIA* 12-32, and it was concerned about "the many unanswered questions and uncertainties associated with establishing causality of the association between $PM_{2.5}$ and mortality." CASAC Letter, PM JA at 3164.

EPA recognized that its cost estimates were "speculative," *RIA* at 13-7, because it knew of no technologies to bring many areas (at least 20% of the nation) into compliance with the standards by 2010. It overcame this by first assuming the deployment all known controls[15] and then by assuming that additional emissions reductions required to attain the standards would cost $10,000 per ton. This arbitrary figure

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[15] To estimate the cost of full attainment, EPA first identified all known technologies that could achieve emission reductions at $10,000 per ton or less. These technologies combined were only predicted to achieve 23 to 38 percent, *RIA* at 7-9, of the emissions required to comply with the ozone standard and 40 percent, *RIA* at 9-9, of the emissions required to comply with the PM standard. EPA then assumed that the remaining emission reductions could be achieved at $10,000 per ton.

unrealistically assumes that the remaining residual tons of emissions can be removed as inexpensively as the earlier tons. But see Stephen G. Breyer, *supra* at 11 ("Removing that last little bit can involve limited technological choice, high costs, devotion of considerable agency resources, large legal fees, and endless argument."). Other estimates place the costs of reducing the residual emissions at between $30,000 and $90,000 per ton. *RPPI* at 15; see also Randall Lutter, *Is EPA's Ozone Standard Feasible?*, AEI-Brookings Joint Center for Regulatory Studies, Regulatory Analysis No. 99-6 (December 1999) <http://www.aei.brookings.org/search/results.asp> ("meeting the standard in 2010 would cost nearly $5 trillion in one city, and $70 billion in seven other cities"). Again, had such calculations been considered as part of an explicit cost-benefit analysis, EPA would have been forced to select different NAAQS levels.[16]

From a public health perspective, EPA's deliberate disregard of the costs of its NAAQS standards is a serious deficiency because costs expended on reducing levels of ozone and PM could otherwise be devoted to more beneficial purposes. The net public benefit from a broader decision-making focus can be substantial. One recent study conducted at the Harvard Center for Risk Analysis found that a reallocation of current spending from lower risk to higher risk problems could more than double the number of lives saved. See Tammy O. Tengs & John D. Graham, *The Opportunity*

[16] Setting aside the likely overestimate of the benefits of the rules, and simply correcting for the effect of the arbitrary cost cut-off on total cost estimates suggests that both PM and ozone rules will impose social costs far in excess of their benefits. As noted above, RPPI estimated total ozone costs of between $20 billion and $60 billion per year, which is significantly higher than EPA's expected benefits of $1.5 billion to $8.5 billion. Similarly, RPPI's estimated costs of the PM rule range from $70 billion to $150 billion per year, compared to EPA's projected benefits of $19.8 billion to $109.7 billion.

Cost of Haphazard Social Investments in Life-Saving, ch. 8, in *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* (Robert Hahn, ed. 1996). Such gains are likely even when bureaucratic constraints, such as shifting funds across agencies, remain in place.

The ultimate reason, however, for reversing the *Lead Industries* ruling is that it misreads Congress' obvious intent when it required in § 109 that ambient air standards "protect the public health" with an "adequate margin of safety." There is nothing in these terms or anywhere else in the Clean Air Act requiring that major rules encompassing all aspects of the economy be decided by looking selectively at only some of the facts and some of the effects of the rules. Indeed, it is irrational to suggest that Congress meant for EPA to do more harm than good by its regulations. See E. Warren & G. Marchant, *supra* at 417-28; see also *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1221-22 (5th Cir. 1991). Similarly, Congress could not have meant that EPA was authorized to set a standard at any level based on the Administrator's "policy judgment." Direct health effects that are considered under *Lead Industries* are important. But without identifying how and where the benefits diminish or the costs increase, arbitrary and erroneous decisions are inevitable. It is time, in other words, to correct the long-standing mistake made in *Lead Industries* that imposes an irrational decision-making process on EPA that Congress never intended.

IV. UNDER *CHEVRON*, THIS COURT SHOULD DECIDE WHETHER THE CLEAN AIR ACT EXCLUDES CONSIDERATION OF COSTS AND OTHER EFFECTS AND REMAND TO EPA THE ISSUE OF IDENTIFYING SPECIFIC DETERMINATE CRITERIA

Lead Industries' interpretation of the Clean Air Act to exclude consideration of anything other than direct health benefits is a question for the Court because it is clear that

Congress did not intend to constrain EPA's assessment of the effects of its NAAQS rules. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (no deference by court where Congressional intent is clear); accord Federal Cert. Opp. Br. (Docket No. 99-1426) at 9 (review of *Lead Industries* as a *Chevron* step one case). Since *Lead Industries* was a pre-*Chevron* case, the lower court was, within the boundaries of *stare decisis*, bound by that determination. See *Maislin Indus., U.S., Inc. v. Primary Steel, Inc*, 497 U.S. 116, 131 (1990) (once the Court has "determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning"); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992); *National Fed'n of Federal Employees v. Dep't of Interior*, 526 U.S. 86 (1999) (*"NFFE"*).

However, that does not answer whether this Court or EPA should decide in the first instance what "determinate criterion" should be employed by EPA in "drawing lines" of the levels of permissible pollutants pursuant to CAA § 109. By its terms, § 109 requires consideration of the effect of the selected standards on "public health" with an "adequate margin of safety"; however, beyond that positive requirement, § 109 does not rule out consideration of any health, wealth or cost effects. By its terms, however, § 109 provides no direct guidance on the criteria to be applied by EPA in setting standards for particular pollutant levels or for setting the parameters on how EPA's authority is confined. The circumstances here are similar to *NFFE* where the Court found that even though the agency's initial interpretation of the ambiguous statutory term was reasonable, the issue had to be remanded to the FLRA for reconsideration under the newly defined mandate because it may have been clouded by the erroneous reading of the D.C. Circuit. Thus, under *Chevron*, the matter should be remanded to EPA to reinterpret

§ 109 under the new understanding of the factors that can be considered. See 467 U.S. at 842-43.

V. CONCLUSION

The holding in *Lead Industries* that, in setting and revising NAAQS under § 109 of the Clean Air Act, EPA may not consider the costs, feasibility or other effects of implementing the standards, should be set aside. By denying consideration of cost-benefit as well as of health-health and wealth-health effects, *Lead Industries* does more harm than good. Its mischievous redesign of § 109 should be set aside. Only a broad balancing of all consequences, such as are facilitated by a robust cost-benefit analysis, will truly meet the Clean Air Act's goals.

Respectfully submitted,

July 21, 2000

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF CROSS-PETITIONERS

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

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INTEREST OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears in federal and state court proceedings to defend the principles of free enterprise and limited and accountable government. WLF has appeared before this Court on numerous occasions as *amicus curiae* in cases involving statutory interpretation and separation of powers. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.* 120 S. Ct. 1291 (2000); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). WLF also filed comments before EPA opposing the promulgation of the NAAQS at issue in this case.

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared as *amicus curiae* before this Court in many cases along with WLF.[1]

Amici are interested in both the statutory interpretation issue presented in this cross-petition and the non-delegation issue presented in *Browner v. American Trucking Ass'ns*, No. 99-1257. This brief addresses both questions not only in the interest of judicial economy, but because the issues are closely related and fairly raised in the cross-petition, especially in light of this Court's practice of interpreting statutes to avoid potential constitutional difficulties. *See* Section III, *infra*. *Amici* submit this brief in support of Respondents/Cross-Petitioners ATA, *et al.*, with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Nothing in the text of the Clean Air Act suggests that EPA cannot take into account economic impact, feasibility, and the significance of the targeted health risks in setting NAAQS. Nonetheless, the court below accepted EPA's argument that the Act forbids the agency from taking these factors into account, relying on *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980).

That decision effectively forces EPA to blind itself to one side of the regulatory equation. If EPA can consider only health factors, without evaluating economic impact, feasibility, or the significance of risks, the only determinate level for any pollutant is that which eliminates all health risks. Short of such a zero-tolerance standard, which understandably, no party advocates, EPA is left adrift. EPA always can justify pushing the acceptable level of pollution closer to zero-tolerance, and the point short of zero-tolerance that EPA chooses is the product of agency whim rather than rational application of a legislated standard.

This interpretation raises serious and unique non-delegation problems. Although this Court repeatedly has rejected claims that Congress failed to provide sufficient guidance in a grant of broad regulatory authority, this case involves a distinct non-delegation problem. Here the difficulty is that the statute, as interpreted by EPA, affirmatively deprives the agency of the necessary regulatory tools to set NAAQS in a rational manner. Unlike the typical complaint that Congress omitted intelligible principles, this case involves an error of commission.

This Court should interpret the Clean Air Act to avoid this potential constitutional difficulty. Nothing in the Act precludes consideration of the limiting principles necessary to allow EPA to set NAAQS according to intelligible principles. The D.C. Circuit's contrary conclusion rests on a misreading of the statute and a failure to heed the common-

sense notion that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). The text of the Act clearly permits EPA to consider costs, feasibility, and significance, and requiring EPA to consider those factors avoids potential non-delegation difficulties.

This Court has long recognized the challenges of discerning the precise limits of the non-delegation doctrine, *see, e.g., Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). Nonetheless, no Justice has doubted the importance of the constitutional principles reflected in the doctrine, and the Court continues to use the doctrine to narrow broad grants of discretionary authority. As Chief Justice Marshall recognized in *Wayman*, "the precise boundary of [the doctrine] is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily." *Id.* Interpreting the Act to require EPA to consider economic impact, feasibility, and significance avoids a "delicate and difficult inquiry" into the limits of the non-delegation doctrine.

The problem here inheres in *Lead Industries*, not the Clean Air Act. This Court should reject the former to save the latter from unconstitutional application.

ARGUMENT

I. CONGRESS HAS NOT PRECLUDED EPA FROM CONSIDERING COST, FEASIBILITY, OR THE SIGNIFICANCE OF HEALTH RISKS IN SETTING NAAQS

A. Nothing in the Text or Structure of the Act Prohibits the Use of Limiting Principles

Subsection 109(b)(1), 42 U.S.C. § 7409(b)(1), directs EPA to set NAAQS "the attainment and maintenance of which in the judgment of the Administrator, based on such

criteria and allowing an adequate margin of safety, are requisite to protect the public health." On its face, this provision does not rule out consideration of the cost and feasibility of compliance or the significance of health risks.

The D.C. Circuit's view that "Congress direct[ed] [the] agency to consider only certain factors in reaching an administrative decision," *Lead Industries*, 647 F.2d at 1150, has no support in the statute's text. While the court claimed that "the statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109," *id.* at 1148, it was at best half right. Nothing in "the statute" remotely compels this counterintuitive conclusion.

Lead Industries' brief discussion of the statute (a prologue to its much more extensive analysis of legislative history) is deeply flawed. The court relied on § 109(b)(1)'s reference to "such criteria" and § 110's standards for EPA review of state implementation plans ("SIPs") to "confirm the view that the Administrator is not required or allowed to consider economic and technological feasibility in setting air quality standards." 647 F.2d at 1149 n.37.

In reality, both of these provisions confirm that Congress did *not* prohibit EPA from considering cost or feasibility or from targeting only significant risks to health. Section 109(b)(1)'s reference to "such criteria" refers back to § 108(a)(2), which requires EPA to issue "air quality criteria" for each pollutant. As even *Lead Industries* recognized, "criteria" as used here is a term of art denoting a document, not a set of factors or a standard for decision. *See* 647 F.2d at 1136-37. What is more, the statute's instruction that "[t]he criteria for an air pollutant, to the extent practicable, shall *include* information on" certain issues, 42 U.S.C. § 7408(a)(2) (emphasis added), is, by its very terms, inclusive rather than exclusive. Accordingly, § 109(b)(1)'s reference to "such criteria" provides no warrant for the exclusion of cost and related considerations.

Section 110 likewise confirms that the Act does not foreclose the consideration of economic impact, feasibility, or significance. Nothing in § 110 expressly authorizes States to consider cost and feasibility in selecting a mix of control devices to meet the NAAQS set by EPA. Yet it is settled that States may do so. *See, e.g., Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976). As *Lead Industries* recognized, the statute does make clear that States may consider cost and feasibility "only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards." 647 F.2d at 1149 n.37. *Lead Industries* misconstrued this partial limitation as an explicit authorization for States to consider cost that is missing with respect to EPA. However, this limitation on state authority is just that. States' ability to consider cost and feasibility was an unstated default assumption of the statute, and that same default assumption should apply to EPA, *see* Section IB, *infra*.[2]

Lead Industries' conclusion also is in tension with § 108(b)(1). That provision requires EPA to provide States with "data relating to the cost of installation and operation" of control measures *before* it opens a NAAQS rulemaking. 42 U.S.C. § 7408(b)(1). This requirement enables States to address cost issues in their comments. It would make little sense (and, indeed, would create a moral hazard) to direct EPA to develop and provide this information before beginning a rulemaking, only to require EPA to ignore it during the rulemaking.

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[2] *Lead Industries* also noted that "the Administrator, in reviewing a [SIP], may not consider economic or technological feasibility." *Id.* This fact is equally irrelevant. Congress' decision not to authorize EPA to second-guess States' choices about how to meet EPA's standards reflects basic principles of federalism expressly affirmed in the Act, and has no bearing on whether EPA may consider cost or feasibility in setting those standards. *See* 42 U.S.C. § 7401(a)(3) (finding that air pollution control "is the primary responsibility of States and local governments").

For these reasons, nothing in the text of the Act supports *Lead Industries*' holding. Indeed, *Lead Industries* did not seriously attempt to rest its holding on the statutory text. The court noted that "Section 109(b) does not specify precisely what Congress had in mind when it directed the Administrator to prescribe air quality standards that are 'requisite to protect the public health.'" 647 F.2d at 1152. After *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), this observation would lead a court to conclude that Congress has not "directly spoken to the precise question," *id.* at 842, of whether EPA can consider costs, feasibility, and significance.[3] That recognition, in turn, would compel the conclusion that the statute does not preclude EPA from considering these factors. *See id.* at 843.[4]

Rather than analyze the statutory text in any depth, however, *Lead Industries* jumped directly from its recognition that the "requisite to protect the public health" standard was ambiguous into an extended analysis of

[3] Subsequent D.C. Circuit cases have read *Lead Industries* as equivalent to a *Chevron* step-one case, holding that the "statute on its face does not allow consideration of technological or economic feasibility." *NRDC v. EPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (*en banc*) ("*Vinyl Chloride*"). In reality, however, the "statute on its face" is silent on that question, and Congress therefore has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842.

[4] To be sure, *Lead Industries* might have reached the same result by upholding EPA's position under step two of *Chevron*. But that reflects the fact that no party raised a non-delegation claim necessitating the application of principles of constitutional avoidance that would make *Chevron* deference inappropriate. *See* Section III, *infra*. In fact, the author of *Lead Industries* advocated applying the non-delegation doctrine as a constitutional avoidance principle. *See* J. Skelly Wright, *Beyond Discretionary Justice*, 81 Yale L. J. 575, 596 (1972) ("the very breadth" of many statutory delegations "provides an argument for a narrowing judicial construction"). At the very least, § 109(b)(1) certainly does not prohibit the consideration of costs with such clarity that no saving construction is possible. *See* Section III, *infra*.

legislative history. The court devoted four pages to considering the meaning of "adverse health effects," a term that appears nowhere in the statute, and held that the goal of protecting the public from "adverse health effects" doomed the argument that the statute covered only "clearly harmful" health effects. *See id.* at 1152-55. This approach cannot be reconciled with *Chevron*, the proper relationship between statutory text and legislative history,[5] or, as demonstrated in Section III, *infra*, principles of constitutional avoidance.[6]

[5] The court searched the legislative history for a legislative purpose while ignoring the purposes set forth in the statute itself. The Act's "declaration of purpose," which unlike the legislative history was enacted by Congress and approved by the President, demonstrates that Congress' intent was far more balanced. The Act expresses an intent to promote "the productive capacity of [the Nation's] population," a purpose that hardly suggests a mandate to ignore compliance costs. 42 U.S.C. § 7401(b)(1). Moreover, Congress also declared "[a] primary goal" of promoting "reasonable" governmental actions, 42 U.S.C. § 7401(c), which counsels in favor of requiring a reasonable relationship between the costs and benefits of regulations.

[6] In any event, the legislative history of the Act, not surprisingly, does not speak with a single, clear voice on the consideration of economic factors. *See, e.g.*, H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 127 (1977) ("Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should [b]e set at zero or background levels. Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical.") (quoted in *Lead Industries*, 647 F.2d at 1151 n.41). Moreover, the legislative history is silent on the precise question of whether EPA can consider costs, feasibility, and significance in setting NAAQS under § 109(b)(1). Of course, "[i]t is a rare case indeed in which the legislative history alone will permit [a court] to find that Congress has addressed the precise question at issue." *Texas Sav. & Commun. Bankers Ass'n v. Federal Housing Fin. Bd.*, 201 F.3d 551, 555 n.4 (5th Cir. 2000) (quotation omitted).

B. Unless a Statute Precludes It, an Agency Should Be Permitted to Consider Cost, Feasibility, and the Significance of Harms

Lead Industries conflicts not only with the relevant principles of statutory construction, but with common sense as well. *Lead Industries* read congressional silence to preclude EPA from considering cost, feasibility, or significance. However, common sense dictates that, unless expressly forbidden, an agency should be free to take these factors into account. This default rule of construction recognizes that Congress usually, and understandably, does not intend agencies to promulgate regulations that produce little benefit at great cost or that seek to eliminate every risk to health, no matter how improbable or trivial. As this Court has emphasized, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). If, on occasion, Congress intends otherwise, it should make that extraordinary intent unmistakably clear in the statute.

The Act here does not expressly preclude consideration of costs, feasibility, and significance, and the statutory text is consistent with the consideration of these regulatory factors. None of the relevant statutory terms – "health," "protect," "safety," and "adequate" – is absolute. *See, e.g.*, Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 76 (1993) ("the meaning of the word 'safety' . . . depends, in part, upon context"). Nor has Congress decreed absolutist mandates. Congress has not, for example, mandated that NAAQS "shall protect the public health at all cost," or protect against "any threat to public health." Likewise, Congress did not define "health" or "safety" as "the absence of any and all bodily effects" or of

"any and all risk."[7] Accordingly, this Court should read § 109(b)(1) to allow for the consideration of compliance costs, feasibility, and the relative significance of health risks.

Courts repeatedly have recognized the common-sense presumption that agencies may consider such factors. In the *Benzene* case, this Court confronted an OSHA Act provision that sought health goals in aspirational language. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 639 (1980) (addressing a standard providing that "no employee will suffer material impairment of health or functional capacity"). The statute explicitly directed the agency to consider feasibility and did not expressly limit regulations to those necessary to prevent "a significant risk of harm." Nonetheless, the Court recognized that Congress must have intended such a limitation. *Id.* at 642. Observing that "'safe' is not the equivalent of 'risk-free,'" *id.*, the plurality rejected OSHA's view that the statute was intended "to eliminate completely and with absolute certainty any risk of serious harm," *id.* at 641, and held instead that "a workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm." *Id.* at 642.

Benezene's rule of construction applies with even greater force in this case because EPA views the statute as foreclosing consideration of feasibility, cost, *and* the significance of risks. "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give [EPA] the unprecedented power over American industry that would result from the Government's view" that EPA has authority "to impose enormous costs that might produce little, if any, discernible benefit." *Id.* at 645.

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[7] This distinguishes *TVA v. Hill*, 437 U.S. 153 (1978), on which *Lead Industries* relied. In *Hill*, the Court noted that Congress employed absolute language that "admits of no exception." 437 U.S. at 173.

The D.C. Circuit has applied this presumption to a different provision of the Clean Air Act. Rejecting the argument that EPA could not consider cost in determining appropriate remedies to prevent one State's emissions from "contribut[ing] significantly" to nonattainment in a neighboring State, the court reaffirmed the "settled" rule that "[i]t is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *State of Michigan v. U.S. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (quoting *Vinyl Chloride*, 824 F.2d at 1163, and citing numerous cases). This common-sense presumption also finds expression in President Clinton's Executive Order requiring every agency to "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Exec. Order No. 12,866, § 1(b)(6) (Sept. 30, 1993).

Lead Industries, decided five days before *Benzene*, concluded that EPA could not consider cost, feasibility, or whether substances are "clearly harmful" because Congress had "subordinate[d] such concerns to the achievement of health goals." 647 F.2d at 1149. But this is a false dichotomy. It ignores this Court's caution that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526. There is nothing inconsistent in declaring health protection to be the overriding objective but declining to "pursu[e] [that] purpose[ ] at all costs." *Id.* at 525-26.

Similarly, recognizing the Act's "technology-forcing" character, *see Lead Industries*, 647 F.2d at 1149, does not compel the conclusion that technology must be "forced" even where doing so will "impose enormous costs that might produce little, if any, discernible benefit." *Benzene*, 447 U.S.

at 645 (plurality opinion). This Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983), makes this point clear. The Motor Vehicle Safety Act identifies "safety to be the preeminent factor," *id.* at 55, and requires "technology-forcing" safety standards, *id.* at 49. Nonetheless, the Court did not perceive any inconsistency in making safety the primary goal but forswearing absolutism and unreason in pursuit of that goal. The Court reiterated that "'safety is the paramount purpose,'" but expressly "'recognize[d] . . . that the Secretary will necessarily consider reasonableness of cost, feasibility and adequate leadtime.'" *Id.* at 55 (quoting S. Rep. No. 1301, 89th Cong., 2d Sess. at 6 (1966)).[8]

[8] Nothing in this Court's decision in *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) ("*Cotton Dust*"), contradicts the presumption that an agency should be *permitted* to consider cost and feasibility unless prohibited by the statute. In *Cotton Dust*, the Court held only that OSHA was not *required* to balance costs and benefits. The Court already had held in *Benzene* that OSHA was limited to regulating significant risks, and the statute itself imposed a feasibility limitation. *See Cotton Dust*, 452 U.S. at 508. With these limiting principles already established, the Court held that cost-benefit analysis was not mandated. *See id.* at 509 ("Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is."). The majority subsequently noted in *dictum* that the statute lacked any language expressly *requiring* cost-benefit analysis. *See id.* at 510-11 ("Congress uses specific language when intending that an agency engage in cost-benefit analysis."). The Court made clear, however, that Congress need not use any "specific language" to *permit* an agency to engage in cost-benefit analysis. *See id.*

II. THE CLEAN AIR ACT, AS CONSTRUED BY EPA, CANNOT BE SQUARED WITH THE NON-DELEGATION DOCTRINE

A. Despite the Difficulty of Applying It, the Non-Delegation Doctrine Remains an Important Constitutional Principle

The governing test for unconstitutional delegations has remained constant since at least 1928. Congress cannot delegate rulemaking authority to an agency if it fails to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). After twice striking down congressional acts as unconstitutional delegations in 1935, *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the Court has sustained a variety of broad delegations of rulemaking authority as providing the requisite "intelligible principles." As examples, the Court has approved directions to agencies to set prices that are "fair and equitable," *Yakus v. United States*, 321 U.S. 414, 420 (1944), and rates that are "just and reasonable," *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944), and to grant broadcast licenses in the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943).

In more recent cases, the Court has used the broad standards approved in these earlier cases as a permissive yardstick to measure and approve grants of substantial discretion. In *Mistretta v. United States*, 488 U.S. 361, 374 (1989), for example, the Court observed: "In light of our approval of these broad delegations, we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements." Likewise, in *Touby v. United States*, 500 U.S. 160, 165 (1991), the Court concluded that, "[i]n light of these precedents, one cannot plausibly argue that § 201(h)'s 'imminent hazard to the public safety' standard is not an intelligible principle." Indeed, at least one Justice has expressed doubt that any statute could fail to provide an intelligible principle in light of the Court's approval of the "public interest" standard. *See, e.g., Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

Although the test the Court employs to identify unconstitutional delegations provides Congress with considerable latitude, the Court never has doubted the continuing vitality of the important constitutional principles reflected in the non-delegation doctrine. The doctrine reflects the fundamental requirement of our Constitution that all legislative power must be exercised by Congress. *See* U.S. Const., Art. I, § 1. There is no gainsaying the importance of this requirement. As Justice Scalia put the point in the first section of his *Mistretta* dissent (in which he "fully agreed" with the Court's rejection of the challenge to the breadth, as opposed to destination, of the delegation): "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded." *Id.* at 415. Accordingly, the deferential nature of the Court's non-delegation test stems not from any skepticism about the importance of the constitutional values reflected in the doctrine, but rather from the difficulty of encapsulating those values in an easily administrable test. "[W]hile the doctrine of unconstitutional delegations is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." *Id.*[9]

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[9] Despite the difficulty of drawing easily administrable lines in this area, many courts continue to enforce non-delegation principles found in State constitutions. *See, e.g., Guillou v. State Div. of Motor Vehicles*, 503 A.2d 838, 841 (N.H. 1986) (unanimously striking down statute as "sufficiently vague and indefinite to amount to an unconstitutional

B. EPA's Construction of the Act Raises a Distinct Non-Delegation Problem From That Typically Considered by This Court

This case involves a non-delegation problem that is distinct from that raised and rejected in numerous cases since 1935. This Court's non-delegation cases all have involved claims that Congress failed to provide the agency with sufficient direction. These cases essentially alleged errors of omission. By authorizing agencies to regulate "in the public interest" or to set "just and reasonable" rates, Congress failed to constrain agency discretion with "intelligible principles," or so the argument has gone.[1] This case is different. The fundamental problem here is not that Congress failed to give EPA any direction in setting NAAQS, although it gave precious little. Rather, the non-delegation defect here is that the statute, at least as interpreted by EPA and the court below, affirmatively precludes EPA from employing tools that are necessary to convert the broad statutory standards into "intelligible principles." In short, this case involves an error of commission.

It is one thing for Congress to grant an agency broad authority to set "fair and equitable" prices or "just and reasonable" rates. This Court repeatedly has approved such grants of authority despite their breadth. *See, e.g., Yakus, supra*; *Hope Natural Gas, supra*. However, part of the reason such broad grants do not deprive agencies of "intelligible principles" is that the context of the statute makes clear that the agency must balance the interests of the concerned parties, and the agency possesses certain obvious tools to balance those interests. For example, in setting prices and rates, agencies necessarily must balance the interests of consumers and suppliers. *See, e.g., Hope*

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delegation of legislative authority"); *see generally* Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 Admin. L. J. Am. U. 567 (1994).

Natural Gas, 320 U.S. at 603 ("The rate-making process under the Act, *i.e.*, the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."). Moreover, the costs of providing the service provide a critical reference point for striking this balance. *See, e.g., Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940) (minimum and maximum coal prices fixed by reference to measures of cost); *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 211 (1912) (ICC must have access to carriers' cost and financial information "to successfully perform its duties in respect to reasonable rates"). These same basic trade-offs remain central, and costs retain their importance, whether the agency is tasked with regulating the prices of commodities during wartime or the rates for railroads or natural gas during peacetime.

Accordingly, it would be quite a different matter if Congress were to delegate broad authority to set "fair and equitable" prices or "just and reasonable" rates, but affirmatively specify that the agency could not take into account the costs of supplying the service or the interests of suppliers. By prohibiting reference to costs or the interests of suppliers, the statute would deprive the agency of any meaningful basis for setting a price above zero. The agency always could justify setting the "just and reasonable" rate a little bit lower. The exact point above zero where the agency chose to stop would be the product of agency whim, rather than an intelligible principle laid down by Congress.

Although the grant of authority to set "just and reasonable" rates itself does not fail to provide intelligible principles, the prohibition on the consideration of costs or the interests of suppliers would deprive the standard of any intelligible content. Such a statute would involve an error of commission, not omission. Congress cannot grant an agency such broad authority and simultaneously deny it the ability to use the regulatory tools necessary to give that broad standard meaningful content. In other words, Congress cannot grant

an agency broad authority to regulate and then force the agency to ignore half the regulatory equation.

By the same token, Congress presumably could give EPA broad authority to set NAAQS to avoid adverse health effects from pollutants without violating this Court's non-delegation precedents. The common-sense need to balance benefits and costs to avoid pressing regulation to the point of unreason, *see, e.g.*, Exec. Order No. 12,866, § 1(b)(6) (Sept. 30, 1993), would help to inform an otherwise broad delegation of authority. However, if Congress granted EPA broad authority to set health-protecting standards for non-threshold pollutants, and then affirmatively precluded EPA from considering economic impact, the significance of the health risks, or any factor on the other side of the equation, the resulting statute would raise serious non-delegation problems.

If faced with such a statute, EPA would have no meaningful basis for selecting any NAAQS above a zero-tolerance level (which is zero, for a non-threshold pollutant). If economic impact, technological and economic feasibility, and the interests of industry more generally all were off limits, EPA would have recourse to no limiting principle to identify a stopping point. EPA always could justify setting the permissible level a little lower to achieve a little more health protection. Just as in the rate-setting hypothetical discussed above, with no countervailing consideration to weigh against each marginal increase in health protection, EPA's decision as to which non-zero level to pick would be a product of whim, rather than i..telligible principles.

As interpreted by EPA and the D.C. Circuit since *Lead Industries*, § 109(b)(1) comes perilously close to the unconstitutional statute described above. The D.C. Circuit interprets the Act to preclude EPA from conducting cost-benefit analysis or otherwise considering the costs imposed on industry or the feasibility of compliance. *See* U.S. Pet. App. 14a-15a. Indeed, the D.C. Circuit does not even

recognize a "significance" requirement that at least would limit EPA to protecting against health effects that are "clearly harmful," *see Lead Industries,* 647 F.2d at 1154-55, and EPA specifically opposed a significant-risk limitation akin to that adopted by this Court in *Benzene.*[10] At the same time, it is clear that neither Congress nor EPA has any desire to demand zero tolerance. Such a result would avoid a delegation problem at the expense of outlawing industry. *See* U.S. Pet. App. 15a.

Accordingly, it is clear that Congress intended EPA to set NAAQS that are protective of health while permitting some non-zero level of pollution (and therefore some non-zero risk to health). However, if EPA cannot consider countervailing costs to industry, the feasibility of attaining compliance, and the significance of the health risks, then the statute provides EPA with no intelligible principle to set any particular NAAQS.

For its part, EPA candidly admitted its free reign over the standard-setting process. EPA conceded that it followed "no generalized paradigm" and that its decisions "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." 62 Fed. Reg. 38,856, 38,883 (1997).[11] By openly admitting that it was free to

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[10] In the court below, EPA argued that the Act forecloses "a 'test' under which the Administrator must first make a finding that the existing standard permits a 'significant risk of harm' to public health, and then demonstrate that the revised standard is 'needed to improve demonstrably the overall public health.'" *See* EPA Ozone Br. at 42.

[11] EPA also viewed itself as not bound by reliability requirements for scientific evidence, such as those announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. Some commentators suggest that this failure constitutes an additional ground for rejecting EPA's decisions under the APA. *See* Charles D. Weller & David B. Graham, *New Approaches to Environmental Law and Agency Regulation: The* Daubert *Litigation Approach,* 30 Envtl. L. Rep. 10557, 10569 (2000).

ignore all apparent limiting principles, EPA practically dared the court below to find an unconstitutional delegation.

Importantly, EPA's virtually unfettered discretion stems from the interpretation of the Act to preclude EPA from considering economic impact or employing other tools that would cabin its discretion, not from a failure by Congress to provide sufficient guidance in its original grant of authority. It is a non-delegation error of commission, not omission.

Moreover, this error of commission is not inherent in the statute. As demonstrated in Section I, *supra*, the relevant statutory text neither necessarily nor obviously precludes the consideration of economic impact. To the contrary, the plain text of the statute is compatible with a construction that permits EPA to consider the significance of health risks in relation to the costs of compliance, and a presumption allowing agencies to consider such costs makes sense. *See* Stephen G. Breyer & Richard B. Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY 350 (3d ed. 1992) ("How can the significance of a risk be determined in isolation from the cost of eliminating the risk?"). In addition, as demonstrated in Section III, *infra*, to the extent there is ambiguity in the statutory text, this Court should require EPA to take costs, feasibility, and the significance of health risks into account. If the statute can be read either to exacerbate or avoid delegation problems, both constitutional values underlying the non-delegation doctrine and general principles of constitutional avoidance require *the courts* (not the agency) to interpret the statute to avoid delegation problems.

III. THE COURT CAN AVOID NON-DELEGATION DIFFICULTIES BY INTERPRETING THE ACT TO REQUIRE CONSIDERATION OF COSTS, FEASIBILITY, AND SIGNIFICANCE

This Court should apply *Ashwander* principles of constitutional avoidance, *see Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring), to interpret the Clean Air Act to avoid the delegation problems created by EPA's construction. In particular, the Court should use *Ashwander* and the constitutional values underlying the non-delegation doctrine to fashion a clear statement rule. Unless Congress makes its intent unmistakably clear, a court should not interpret a grant of regulatory authority to preclude the agency from considering one half of the relevant regulatory equation. In the context of environmental regulation, courts should require Congress to speak with unmistakable clarity if it intends to preclude the consideration of economic impact. Likewise, in the context of rate or price regulation, an intent to preclude the consideration of supply costs would need to be unmistakable.

These clear statement rules would serve both general interests in constitutional avoidance and the specific values underlying the non-delegation doctrine. Importantly, courts should apply these *Ashwander* and clear statement principles before moving to the second step of the *Chevron* analysis. The contrary approach of the court below, which would vest the primary responsibility for avoiding unconstitutional delegations in the agency, conflicts with the underlying purpose of the non-delegation doctrine.

A. The Non-Delegation Doctrine Is Well-Suited For Use as a Tool to Avoid Constitutionally Suspect Interpretations of Statutes

As noted in Section II, *supra*, the non-delegation doctrine remains an important constitutional principle, despite the Court's difficulty in formulating a workable test for identifying unconstitutional delegations. No Justice has expressed any doubts about the constitutional basis for the doctrine or suggested that the Court should ignore delegation concerns. To the contrary, the Court has taken delegation issues seriously. The paucity of cases finding unconstitutional delegations stems not from skepticism over the non-delegation doctrine's *bona fides*, but from the difficulty of encapsulating the doctrine in a test that is "readily enforceable by the courts." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

This Court has long recognized that the line between permissible delegations of discretion and unconstitutional delegations of legislative authority "has not been exactly drawn." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Chief Justice Marshall, writing for the Court in *Wayman*, noted that "there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of" others in fulfilling legislative commands. *Id.* at 46. Although "the maker of the law may commit something to the discretion of the other departments, . . . the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily." *Id.*

However, the "difficulty in discerning the exact limits" and "precise boundary" of permissible delegation does not mean that the Court needs to abandon the non-delegation doctrine as an interpretive principle. The Court recognized as much in *Mistretta*. While emphasizing that it repeatedly had upheld "Congress' ability to delegate power under broad

standards," the Court noted that it had employed the non-delegation doctrine in "the interpretation of statutory texts, and, more particularly, to giv[e] narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." 488 U.S. at 373 & n.7.

Indeed, the difficulty in fashioning a clear test to identify unconstitutional delegations and the sensitive separation of powers concerns implicated by the non-delegation doctrine make it particularly well-suited to application as an aid in statutory construction. Striking down a statute as an unconstitutional delegation requires the courts to declare an act beyond the power of Congress. Courts, which are generally reluctant to take this extreme step, are all the more hesitant when equipped only with a test that has proven difficult to apply. As Chief Justice Marshall summarized, the non-delegation doctrine "is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." *Wayman*, 10 Wheat. at 46. The use of *Ashwander* and clear statement principles makes sense in the non-delegation context precisely because they allow the courts to avoid engaging in a "delicate and difficult inquiry . . . unnecessarily."

This Court adopted a clear statement principle to avoid a similarly "delicate and difficult inquiry" in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985), the Court concluded that the Tenth Amendment does not lend itself to judicial enforcement both because the text does not suggest any clear rules and because the political branches are well-placed to address concerns over federal and state relations. In *Ashcroft*, this Court recognized that it was "constrained in [its] ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause." 501 U.S. at 546 (citing *Garcia*). Nonetheless, despite the established limits on its ability to play a primary role in enforcing the Tenth Amendment, the Court staked out

an important complementary role in promoting the underlying values of the Tenth Amendment by adopting a clear statement rule.

The clear statement rule served two purposes. Not only did it help "avoid a potential constitutional problem," but it ensured that Congress would be put on notice when considering legislation that implicated state prerogatives.[12] *Id.*; *see also United States v. Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."). A clear statement rule could play the same twin roles in the non-delegation context. Such a rule would avoid potential constitutional difficulties and ensure that Congress thoroughly considers substantial delegations of discretion and the implications of precluding agencies from using tools that would help cabin that discretion.[13]

In addition, application of *Ashwander* and clear statement principles advances the underlying values of the

[12] Generally, *Ashwander* principles are triggered when one interpretation of a statute raises "serious doubt" about its constitutionality. *See, e.g.*, *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). However, in the context of constitutional provisions that do not readily lend themselves to judicial enforcement, like the Tenth Amendment or the non-delegation doctrine, the trigger for the application of *Ashwander* must be the conviction that serious constitutional issues are implicated, not "serious doubt" about the ultimate constitutional question. *Ashcroft* makes this point clear. Even though the Court recognized that *Garcia* virtually foreclosed a successful Tenth Amendment challenge, the Court applied the clear statement rule to "avoid a potential constitutional problem." *See* 501 U.S. at 464.

[13] Indeed, a clear statement rule for delegations is easier to justify than the rule adopted in *Ashcroft*. *Garcia* rejected the governing Tenth Amendment test as "unsound in principle and unworkable in practice." 469 U.S. at 546. In contrast, the Court never has questioned the soundness of the non-delegation doctrine.

non-delegation doctrine. The fundamental purpose of the doctrine is to promote legislative accountability by ensuring that the people's elected representatives in Congress alone exercise the legislative power. A clear statement rule for questionable delegations likewise promotes legislative accountability. It ensures that Congress actually considers whether to grant discretion to administrative agencies, with the result that any discretion granted to agencies will reflect Congress' conscious exercise of its legislative authority.

Indeed, so clear is the link between *Ashwander* and the non-delegation doctrine that some commentators have suggested that the application of *Ashwander* to agency interpretations of statutes in general reflects the values of the non-delegation doctrine. *See, e.g.*, Cass Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 331-32 (2000); Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 358 (1999). In other words, courts are reluctant to allow agencies to interpret statutes to apply extraterritorially or to implicate rights across the constitutional spectrum precisely because Congress should not be presumed to delegate such delicate legislative issues unless its intent is unmistakably clear. This Court made a similar point in *Greene v. McElroy*, 360 U.S. 474, 507 (1959): "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."

In sum, application of the non-delegation doctrine as an *Ashwander* or clear statement principle avoids the difficulties raised by direct enforcement of the doctrine while at the same time ensuring that the important constitutional values underlying the doctrine are not discarded. Even if the non-delegation doctrine does not lend itself to a "readily enforceable" test for striking down acts of Congress, courts

face little institutional difficulty in identifying the construction of a statute that avoids delegation problems.

B. This Court Consistently Has Applied Non-Delegation Principles as an Aid to Statutory Construction

One clear example of this Court's use of the non-delegation doctrine as an *Ashwander* principle is *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974) ("*NCTA*"). The statute at issue there authorized the FCC to set fees that were "fair and equitable taking into consideration direct and indirect cost to the government, value to the recipient, public policy or interest served, and other pertinent facts." *See id.* at 337. The Court expressed concern that allowing the FCC to set fees that reflected its view of "public policy" would risk permitting an unconstitutional delegation of Congress' taxing authority. *See id.* at 342-44. To avoid this possibility, the Court interpreted the statute to allow fees to be set only with reference to the "value to the recipient." *See id.* at 344. The Court expressly invoked the non-delegation doctrine to narrow the statute: "Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems." *Id.* at 342.

The Court likewise invoked the non-delegation doctrine in *Kent v. Dulles*, 357 U.S. 116 (1958), to preclude the Secretary of State from denying passports to certain individuals despite Congress' grant of broad authority to "grant and issue passports . . . under such rules as the President shall designate and prescribe." *See id.* at 129. The decision is particularly noteworthy because the Court invoked non-delegation principles in the foreign affairs

context, where executive discretion reaches its zenith. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 445 (1998).

Similarly, a plurality of this Court in *Benzene* employed the non-delegation doctrine to find a statutory requirement that health risks be significant. Even though the statute imposed an express "feasibility" constraint, the plurality observed that unless OSHA also was limited to targeting risks that were "significant," "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in" *Schechter* and *Panama Refining*. *See* 448 U.S. at 646. The plurality recognized that "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.*

Although these cases predate *Chevron*, the application of constitutional avoidance principles to narrow potentially excessive grants of discretion is a task for the courts, not the agency. In other words, courts must apply the non-delegation doctrine as an aid to statutory construction before moving to the more deferential step two of the *Chevron* analysis. As a general matter, this Court has made clear that courts should apply *Ashwander* principles before moving to step two. For example, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568 (1988), the Court rejected the NLRB's interpretation of a statute to preclude peaceful handbilling in a shopping mall. The Court made clear that the NLRB's construction "would normally be entitled to deference" under *Chevron*. *Id.* at 574. Nonetheless, the Court rejected the interpretation because it "pose[d] serious questions of the validity of [the statute] under the First Amendment." *Id.* at 575; *see also NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (applying constitutional avoidance principles to invalidate the NLRB's interpretation of a statute pre-*Chevron*).

Obviously, neither *Ashwander* nor *Chevron* has any application when a statute is completely unambiguous and subject to only a single construction. *Cf. Miller v. French*, 120 S. Ct. 2246, ____, Slip Op. at 5-6 (June 19, 2000). However, when a statute is subject to more than one construction, *Ashwander* favors the construction that avoids constitutional difficulties while *Chevron* favors the construction adopted by the agency. When the agency fails to adopt the construction of an ambiguous statute that avoids constitutional difficulties, one of the two principles must yield. *DeBartolo* makes clear that *Ashwander* trumps *Chevron*. 485 U.S. at 577 ("Even if this construction of the Act were thought to be a permissible one, we are quite sure that in light of the traditional rule followed in *Catholic Bishop*, we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the statute]."). *Accord Chamber of Commerce v. Federal Election Comm'n*, 69 F.3d 600, 605 (D.C. Cir. 1995); *Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994); *cf. Ashcroft*, *supra* (applying clear statement rule despite dissent's suggestion that the Court should defer to the agency's interpretation under *Chevron*).

The need to employ constitutional avoidance principles before deferring to agency constructions of statutes applies with special force in the non-delegation context. Excessive agency discretion is the very evil against which the non-delegation doctrine guards. To defer to an agency construction of an ambiguous statute that would expand agency discretion to the point of raising constitutional doubts would turn the non-delegation doctrine on its head.

Although the court below correctly recognized that EPA's construction of the statute raised non-delegation problems, it erred by remanding for the agency to identify a narrowing construction of the statute. The court reached this result by mistakenly concluding that the constitutional

avoidance "approach of the *Benzene* case . . . has given way to the approach of *Chevron*." *See* U.S. Pet. App. 76a. This observation simply ignores the teaching of *DeBartolo* that *Ashwander* principles trump *Chevron* deference. Equally important, the methodology of the court below would frustrate the underlying purpose of the non-delegation doctrine by giving agencies additional discretion to interpret grants of legislative authority that already are troublingly broad. *See, e.g., id.* at 94a-95a (Silberman, J., dissenting from denial of rehearing *en banc*) ("It hardly serves – indeed, it contravenes – that purpose to demand that EPA in effect draft a different, narrower version of the Clean Air Act."). This Court recognized as much in rejecting the agencies' broad constructions of their delegated authority in *NCTA*, *Kent*, and *Benzene*. Nothing in *Chevron* alters the wisdom of that approach.

C. The Non-Delegation Problems Raised by EPA's Suggested Interpretation of the Clean Air Act Doom That Construction of the Act

EPA's construction of § 109(b)(1) clearly implicates non-delegation principles. As explained in Section II, *supra*, EPA's construction deems Congress affirmatively to have deprived EPA of the necessary means to set NAAQS pursuant to intelligible principles. By forbidding EPA from considering feasibility and costs and dismissing certain health risks as insignificant, the Act, as interpreted by EPA, defies rational application.

However, the Act need not be construed to deny EPA the necessary tools for its rational application. Nothing in the statutory text prohibits the consideration of economic impact, feasibility, and the significance of health risks. Even if the decision to employ such tools otherwise might be left to agency discretion, *Ashwander* trumps *Chevron* and requires rejecting an interpretation that unnecessarily raises

constitutional issues. Accordingly, the Court should interpret the Act to require EPA to consider these limiting principles in setting NAAQS.

It certainly does no violence to the Act to interpret it to require the consideration of the costs and feasibility of compliance and the significance of risks. Indeed, such an interpretation is far more faithful to the statutory text than the saving constructions previously adopted by this Court to avoid potential delegation problems. For example, in *NCTA*, the Court read a provision authorizing fees that were "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts," *see* 415 U.S. at 337, to permit fees that were "fair and equitable taking into consideration" the "value to the recipient" and nothing else. *See id.* at 342-44. The Court's saving construction necessitated reading sixteen words out of the statute.

In *Kent*, the Court's saving construction required reading words into, rather than out of the statute. Although Congress gave the Secretary of State the unqualified power to "grant and issue passports . . . under such rules as the President shall designate and prescribe," *see* 357 U.S. at 123, the Court wrote in a qualification that denied the Secretary authority to withhold passports based on citizens' political activities. *See id.* at 129.

In contrast to these permissible saving constructions, requiring EPA to consider compliance costs, feasibility, and the significance of health risks fully comports with the text of the Clean Air Act. It does not require reading any words into or out of the statute. It simply requires reading the Act in light of customary, background principles of regulatory analysis.

Indeed, in the context of the particular non-delegation problem raised by EPA's construction – a non-delegation error of commission – this Court should employ a clear statement requirement. Before finding that Congress

arguably has created a non-delegation problem by restricting the agency from employing the regulatory tools necessary to interpret the statute pursuant to intelligible principles, courts should demand that Congress make that intent unmistakably clear. Economic impact, the significance of risks, and the costs and feasibility of providing regulated services are basic building blocks of rational regulation. Courts should not lightly assume that Congress has taken these tools off the table.

This clear statement rule makes sense both as a predictive matter and as an application of principles of constitutional avoidance. It makes little sense to assume that Congress would direct an agency to ignore half of the key regulatory equation, and doing so risks creating serious non-delegation problems. In a case like this, where Congress has not come close to expressing a clear intent to foreclose the consideration of economic impact, feasibility, and the significance of risks, courts should reject such counter-intuitive and constitutionally problematic interpretations.

Whether this Court applies general principles of constitutional avoidance or the clear statement principles suggested above, it should reject EPA's construction of the Clean Air Act. EPA's refusal to consider compliance costs, feasibility, and the significance of health risks unnecessarily deprives the agency of the intelligible principles necessary for rational application of the statute. EPA's construction risks unconstitutional results that simply do not inhere in § 109(b)(1) as written. This Court should reject EPA's position and construe the Act to require EPA to consider economic impact, feasibility, and the significance of risks.

CONCLUSION

For the foregoing reasons, the Court should reject EPA's construction of the Clean Air Act and remand the case to EPA with directions to reformulate the NAAQS in light of intelligible principles.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

American Trucking Associations, Inc., Chamber of Commerce of the United States, et al.,

Cross-Petitioners,

v.

Carol M. Browner, Administrator of the Environmental Protection Agency, et al.,

Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR SENATORS JAMES M. INHOFE, TIM HUTCHINSON, ROBERT F. BENNETT, AND GEORGE VOINOVICH AS *AMICI CURIAE* IN SUPPORT OF CROSS-PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are Senators of the United States of America. Senator James M. Inhofe represents the citizens of Oklahoma. Senator Tim Hutchinson represents the citizens of Arkansas. Senator Robert F. Bennett represents the citizens of Utah. Senator George Voinovich represents the citizens of Ohio.

Senator Inhofe is Chairman of the Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Committee on Environment and Public Works of the United States Senate. Senators Bennett and Voinovich are members of the Subcommittee and Senator Hutchinson served as a member of the Subcommittee in the 105th Congress. While serving as Governor of Ohio, Senator Voinovich was Chairman of the Republican Governors Association Environmental Task Force.

Amici have an interest in ensuring that the statute in question not be construed in a manner that violates the fundamental separation-of-powers principles inherent in the United States Constitution in derogation of their legislative powers and responsibilities. In addition, a*mici* will have substantial legislative responsibility for the reauthorization of the Clean Air Act when the 107th Congress considers it and for oversight of the Administrator's implementation of the Act. Finally,

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, or counsel contributed money or services to the preparation or submission of this brief.

amici represent millions of citizens who will be affected by implementation of the Act. *Amici* are, therefore, vitally interested in the proper construction of the Clean Air Act.

SUMMARY OF ARGUMENT

The Administrator interprets the Clean Air Act to require that, in setting National Ambient Air Quality Standards ("NAAQS"), she may not consider any factor other than benefits to the public health from the standards set. In other words, the Administrator believes that the statute prohibits consideration of countervailing health risks, economic costs or technical feasibility.

This construction of the statute is at odds with the statutory language. The statutory phrase "adequate margin of safety" uses words that permit the Administrator to balance the public health benefits of a proposed NAAQS against other public policy factors. Indeed, Congress could not have intended any other interpretation. Absent consideration of any countervailing factors, the logical import of the Administrator's view is that the statute requires the complete elimination of all human-generated pollutants that have an adverse health effect -- but Congress never intended to order or permit the deindustrialization of America.

Nor can the Administrator's construction of the statute be saved by reliance on an alleged ratification of that construction when the Congress reauthorized the Clean Air Act in 1990. Reliance on subsequent Congressional inaction as ratification gives that inaction legislative character and effect. After this Court's decision in *INS v. Chadha,* 462 U.S. 919, 957 (1983), the

only permissible actions having legislative effect are those that comport with the Presentment Clauses (U.S. CONST. Art. I, § 7, cls. 2, 3) and the structural requirements of separation of powers. Moreover, *amici* can attest to the reality of the modern day legislative process; Congressional inaction has, except in the most unusual circumstances, little, if any, practical interpretive value.

ARGUMENT

The Clean Air Act stands as the signature environmental enactment of the United States Congress. Given its impact on public health and the national economy, the proper construction of the Act is of vital interest to the American people. But far more is at stake in this case than these manifestly significant concerns. In light of the Administrator's actions, the Court is obliged to confront, squarely, fundamental questions about the balance of authority between the Legislative and Executive branches of government.

In 1997, acting pursuant to Section 109(d) of the Clean Air Act, 42 U.S.C. § 7409(d), the Administrator of the Environmental Protection Agency promulgated final rules revising existing NAAQS for ozone, *see* 62 Fed. Reg. 38,855, and particulate matter, *see* 62 Fed. Reg. 38,652. The revised NAAQS were set by the Administrator to meet the statutory mandate that they "allow[] an adequate margin of safety . . . requisite to protect the public health." CAA § 109(b)(1). In setting these standards -- whose implementation will substantially affect every member of the public and all American industry -- the Administrator concluded that the statutory framework prevented consideration of

"economic costs or technical feasibility." *E.g.* 62 Fed. Reg. at 38,878.[2] This interpretation is, however, not consistent with the language and purpose of the Clean Air Act; nor was it ratified by Congressional reauthorization of the Act in 1990.

First, nothing in the language of the Act constrains the Administrator's authority to consider the significance of the risk posed by potential pollution or the costs to be incurred by virtue of the adoption of the proposed regulations. To conclude to the contrary, as the District of Columbia Circuit did in *Lead Industries*, 647 F.2d at 1148, is to presume that Congress has acted irrationally. It has not, and the Administrator has acted under the mistaken belief that the Act prohibits consideration of countervailing health risks and other economic costs.

Second, the Administrator cannot look to the reauthorization of the Clean Air Act in 1990 as a subsequent "ratification" of the statutory interpretation announced in *Lead Industries*. Subsequent legislative inaction does not qualify as an authoritative legislative pronouncement. To rely on inaction as acquiescence is deeply inconsistent with the Constitutional requirement of Presentment (Art. I, § 7, cls. 2, 3) and principles of separation of powers.[3]

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[2] In fairness to the Administrator, she believed that her determination to ignore economic and technical factors, as well as other health-related costs, was mandated by the decision of the District of Columbia Circuit in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980).

[3] By resolving this case on grounds of statutory construction, the Court will avoid the difficult Constitutional questions posed by the delegation doctrine issue presented in the companion case, No. 99-1257. Properly construed, the Clean Air Act permits the Administrator to interpret the Act as embodying an intelligible principle of implementation. As this Court has said: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 120 S.Ct. 1904, 1911 (2000) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S 366, 408 (1909)); *see also Ashwander v. TVA*, 297 U.S. 288, 348 ((1936) (Brandeis, J., concurring). To the extent the Court deems it necessary to address the delegation question at issue in No. 99-1257, *amici* concur that without a limiting principle the Administrator's present construction of the Act renders it an impermissible delegation of the legislative function.

I. The Clean Air Act Does Not Prohibit The Administrator From Considering Countervailing Health Risks, Risk Significance, And Economic Feasibility

The Act requires the Administrator to set NAAQS at a level of ambient air quality sufficient to "allow[] an adequate margin of safety . . . requisite to protect the public health." CAA § 109(b)(1). The Administrator, acting under the aegis of *Lead Industries*, believes that this language requires her to consider only the health-related benefits of a proposed regulation, without regard to countervailing health risks, other economic costs, or the significance of the risks being addressed. Yet nothing in this plain language remotely purports to limit the Administrator's discretion. Indeed, such an interpretation is irrational and contrary to the underlying statutory purpose of the Clean Air Act. Because the Administrator mistakenly believed that the

statute limited her discretion, the decision to adopt the ozone and particulate matter NAAQS was arbitrary and capricious.[4]

A. The Plain Language Of The Statute Does Not Prohibit Consideration Of Costs Or Risk Significance

"As in any case of statutory construction, [the Court's] analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *see also Harris Trust and Savings Bank v. Salmon Smith Barney Inc.*,

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[4] An agency's mistaken interpretation of law renders its decision arbitrary and capricious. "An agency action, however permissible as an exercise of discretion, cannot be sustained 'where it is based not on the agency's own judgment but on an erroneous view of the law.'" *Sea-Land Service, Inc. v Dep't of Transp.*, 137 F.3d 640 (D.C. Cir. 1995) (quoting *Prill v. National Labor Relations Board*, 755 F.2d 941, 947 (D.C. Cir. 1985)); *see also Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[I]f the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."); *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1505 (10th Cir.1995) (agency action founded on mistake of law is arbitrary and capricious under Administrative Procedures Act). For essentially the same reasons, *amici* also believe that the Administrator's position is as an impermissible construction of the law under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Both modes of legal analysis build on the same factual premise -- the Administrator misunderstood the law. *Cf. Smiley v. Citibank (S.D.) N.A.*, 517 US. 735, 741-42 (1996) (*Chevron* II analysis similar to arbitrary and capricious review).

120 S.Ct. 2180, 2191 (2000) (same). Thus, if an examination of the text gives a clear and unequivocal answer to the interpretive question presented, that textual answer controls unless some "clearly expressed legislative intent to the contrary" is manifested in the legislative history of the enactment. *Reeves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

Here the text of the statutory language is clear. The Administrator is obliged to provide an "adequate margin of safety" to protect public health. This is not an absolute command that the Administrator consider *only* public health benefits -- yet the Administrator and the District of Columbia Circuit in *Lead Industries* have misconstrued it as such.

Congress could have enacted the "health only" standard of *Lead Industries* -- and had it wished to do so, it would have written with far greater clarity. Congress might have commanded, for example, that the NAAQS be set to "protect public health to the maximum extent practical without regard for economic costs or technical feasibility" -- but did not. Congress might have written that the NAAQS be set "giving exclusive consideration to the public health benefits resulting from reductions in" pollutants -- but it did not. In *amici*'s experience it would be exceedingly odd for Congress to command that "economic costs, countervailing health risks, and technical feasibility" be ignored without using those words or any reasonable cognates of them in the statute.

To the contrary, the text of CAA § 109(b)(1) speaks in terms of moderation and comparison, not in terms of absolutes. *Amici* believe that "the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9

(1962). Here, the ordinary words used do not support the Administrator's construction of the law.

The word "adequate," for example, connotes sufficiency, not excess. *See* Webster's Collegiate Dictionary 14 (10th ed. 1999) (defining adequate as "sufficient for a specific requirement"). And, in some contexts "adequate" carries with it the implication of minimum sufficiency. *See id.* (alternately defining adequate as "barely sufficient"). Thus, use of the word "adequate" plainly signals that the Administrator is to set NAAQS at a level that suffices to the purpose, and no more.[5]

So too, the use of the word "margin" connotes a "spare amount or measure or degree allowed or given for contingencies." Webster's Collegiate Dictionary 711 (10th ed. 1999). Thus, the statutory text commands the Administrator to strike a balance, defining an adequate margin of safety somewhere above the minimum necessary to protect public health. *Cf. NRDC v. EPA*, 824 F.2d 1146, 1153 (D.C. Cir. 1987) (*en banc*) ("*Vinyl Chloride*") (recognizing that an "ample" margin of safety is one greater than an "adequate" margin).

And finally, the word "safety" also betokens balance. "Safe" means "free from harm or risk" and "secure from threat of danger." Webster's Collegiate Dictionary 1030 (10th ed. 1999). Concepts of "risk" and

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[5] This is consistent with the legislative history in the Senate reflecting an intent that the NAAQS be set at the "*maximum* permissible ambient air level" which will protect the public health. S. Rep. No. 1196, 91st Cong. 2d Sess., at 10 (1970) (emphasis supplied). In other words, the Administrator is to do what is needed, and no more.

"threat" are relative metrics, not absolutes. "Use of the word 'safety' . . . is significant evidence that [Congress] did not intend to require the Administrator to prohibit all emissions of non-threshold pollutants . . . . '[S]afe' does not mean 'risk-free'. . . . [S]omething is 'unsafe' only when it threatens humans with 'a significant risk of harm.'" *Vinyl Chloride*, 824 F.2d at 1153 (citation omitted).[6]

But how is the adequacy of a margin of safety to be measured? Any value beyond the scientifically minimum requisite provides a "margin." And any level of protection provides a measure of "safety" greater than that provided by a less stringent level. To measure the "adequacy" of a margin the margin must be balanced against some countervailing value. In this regard, *Lead Industries'* casual rejection of any countervailing balance to public health benefits is simply inconsistent with the plain language of CAA § 109(b)(1).

The Administrator's reading also disregards parallel textual provisions that were intended to guide the Administrator in assessing the adequacy of the protection of public safety. CAA § 108(a)(2) directs the Administrator to issue criteria -- that is, informational compilations used in NAAQS standard setting, *see* 62 Fed. Reg. at 38,654 (particulate matter criteria), 38,857 (ozone criteria) -- that include information on any "known or anticipated adverse effects on welfare." CAA § 108(a)(2)(C). Consideration of the effects on the

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[6] *Amici* agree that Congress used the phrase "public health" to refer to a well known, scientific discipline. Because the meaning of that reference is fully developed in the parties' briefs, *amici* do not repeat that analysis here.

"welfare" of the public expressly requires consideration of other factors beyond the public health effects of a particular regulation. *See* CAA § 302(h) (defining "welfare" to include, *inter alia*, "effects on economic values and on personal comfort and well-being"); *cf.* U.S. CONST. Preamble ("to . . . promote the general Welfare"). Countervailing economic costs, health risks, and technical factors are potentially "anticipated adverse effects on welfare." Thus, as a matter of textual exegesis, Congress has said that however significant and important the magnitude of any particular public health concern, there are other public policy factors that may be considered in making the requisite regulatory decision.

So that our point is clear, we make it explicit: *Amici* do not contend that the text of CAA § 109(b)(1) *requires* the consideration of economic costs; rather, we make the simpler and equally sustainable point that CAA § 109(b) does not *prohibit* such consideration.[7]

What the law does require is that the Administrator identify some factor -- some aspect of the public "welfare" -- against which to measure the adequacy of the margin of safety proposed. That factor might be the economic cost and technical feasibility of the

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[7] Were the Administrator to give these regulations such consideration she might well reevaluate and revise her decision. As the Office of Management and Budget has reported, the net present value of the costs associated with implementing the ozone final rule, in its current form, exceed the societal benefits of the rule. *See* REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS, at 72 (2000) (costs of $62 billion; benefits of $11-59 billion). Data on the particulate matter final rule are ambiguous. *Id.* at 73 (costs of $230 billion; benefits of $148-816 billion).

regulation proposed; it might be (as we suggest, *infra* § I.B.2) an assessment of the significance of the risk being addressed; it might be a comparative risk analysis attempting to determine whether the resources required to implement the regulation in question would produce greater benefits if put to another use; or it might be some combination of all of these factors. What is unsupportable is the Administrator's assertion of an effectively standardless, unconstrained authority to set NAAQS levels without any attempt to justify the adequacy of the margin of safety proposed.[8]

B. Prohibiting Consideration Of Costs Or Risk Significance Would Be Irrational And Contrary To The Statute's Purpose

Any fair reading of the Administrator's position must acknowledge the irrationality of the decision she supposes Congress to have made. No court should so lightly assume that Congress has legislated without sense. Under the Administrator's interpretation, the Agency may not consider countervailing adverse health risks, nor may it consider other economic costs, nor may

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[8] *See, e.g.* 62 Fed. Reg. at 38,688, ("The Administrator is not limited to any single approach to determining an adequate margin of safety"); *id.* at 38,883 (same). EPA has blandly asserted that its decisions need not be based on any "generalized paradigm;" "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric;" and are "largely judgmental in nature." *Id.* at 38,688, 38,883. This is not a balanced measure of the "adequacy" of a particular margin of safety -- it is an assertion that an arbitrarily set margin is "adequate" simply because the Administrator says it is. The text of CAA § 109(b)(1) demands more.

it consider whether the health risks it addresses are of any public significance. On this reading, the statute logically requires the total elimination of anthropogenic sources of ozone and particulate matter -- a manifestly absurd result that Congress never intended.

1. Prohibiting Consideration Of Costs Effectively Prohibits Consideration Of Countervailing Health Risks

The most striking aspect of the Administrator's counter-intuitive interpretation of CAA § 109 is that the Administrator believes it impermissible to consider whether the regulations proposed might have net adverse health effects. So long, in the Administrator's view, as a positive health benefit from regulation is identified, the substantial (and perhaps significantly greater) adverse health-related costs that will be incurred are of no statutory importance.

Thus, in the ozone final rule, the Administrator affirmatively chose to disregard the potential health benefits of tropospheric ozone as a shield from the harmful effects of ultraviolet radiation. *See, e.g.*, Ozone JA 255-71, 2579, 2666, 2676, 2849, 3089 (summarizing this evidence); *id.* at 210 (declining to consider it). *Amici* are not, of course, in a position to opine on the significance or validity of the scientific data presented in opposition to the ozone rule -- *but at this juncture neither is the Administrator.*

On the present state of the administrative record the Administrator is in an uncomfortable -- and incomprehensible -- position. She argues that even though the beneficent health effects of tropospheric ozone (in preventing skin cancers, for example) may actually outweigh the harmful health effects of tropospheric ozone

(in effecting breathing) the law obliges her to utterly ignore those potentially countervailing health benefits.

But the language of the statute requires no such thing -- the criteria for issuing NAAQS for any particular air pollutant are required to include information on "variable factors which may *alter* the effects on public health or welfare of such air pollutant." CAA § 108(a)(2)(A) (emphasis added). A beneficial health effect is surely one that "alters" the effect on public health. Thus, Congress has spoken directly to this question and rejected this irrational conclusion.

2. The Administrator's Construction Requires Elimination Of All Adverse Health Risks, Regardless Of Costs – An Absurd Result Not Contemplated By The Statute

Of equal significance is the logical import of the Administrator's "health benefit only" focus. For non-threshold pollutants this interpretation has only one intelligible stopping point -- elimination of all anthropogenic pollutant production.

It is a sad, but undisputed, scientific fact that ozone (certainly) and particulate matter (with a high degree of probability) are non-threshold pollutants. *See* 62 Fed. Reg. at 38,863 (ozone); 61 Fed. Reg. at 65,651 (particulate matter). In other words, they have adverse health effects at naturally occurring background atmospheric concentration levels. Thus, even the total elimination of all human ozone and particulate matter production would not suffice to eliminate all adverse public health effects, as natural ozone and particulate matter levels would continue to have adverse effects.

But if (as the Administrator has argued) public health is the only statutorily permissible consideration then there is no bright-line at which to set the requisite NAAQS level. The only logical response to non-threshold pollutants, consistent with that statutory construction, is to minimize adverse health risks to the maximum extent practical -- a standard that, in this instance, calls for the elimination of all human activity which generates either ozone or particulate matter. Such a standard would, of course, be nonsensical, as it would require the closure of every major industrial plant in America and the elimination of all automobile transportation.

The Administrator, understandably, shies away from the implications of her "health benefit only" formulation. Yet, as the court below correctly recognized, Pet.App. 7a-11a (No. 99-1257), any effort to justify an intermediate NAAQS standard above one eliminating all human pollutant production without reference to some counter-balancing factor is nothing more than arbitrary line-drawing, lacking rational basis or explanation.

Amici submit that implicit in the necessity for setting a threshold for non-threshold pollutants is the requirement that the Administrator assess the public significance of the adverse health risks to be addressed.[9] When Congress legislates it does not intend to solve all

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[9] Perhaps this is merely a reformulation of the question of costs. *See* Breyer, Stewart, Sunstein & Spitzer, ADMINISTRATIVE LAW AND REGULATORY POLICY 65 (4th ed. 1999) ("[C]an an agency sensibly decide whether a risk is 'significant' without also examining the cost of eliminating it?"). Alternatively, it may be viewed as a formulation that looks solely to the benefit side of the cost/benefit question.

the problems of air pollution no matter what the costs imposed by the solution. Similarly, it does not enact a statute of general applicability addressed to a particular class of problems (such as, air pollution) with the intent that all problems within the class be addressed no matter how trivial or insignificant. *Amici* can attest that, as this Court has already recognized, legislation of general applicability is typically intended only to address "significant risks" within the general class. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (*"Benzene"*) (construing Occupational Safety and Health Act to require a determination that risk is "significant"). Congress, in legislating, looks to resolve the larger issues of public importance; we do not generally intend to expand the sphere of federal influence to every corner of the economy.

In this instance, the Administrator's construction of the law, carried to its logical endpoint, rests on the premise that Congress intended such an expansion and contemplated the deindustrialization of America. "It is simply not possible that Congress intended such havoc in the American economy and not a single representative or senator mentioned the fact." *Vinyl Chloride*, 824 F.2d at 1155.

3. Congress Should Not Be Presumed To Have Intended To Ignore Societal Costs Imposed By Regulation

Finally, *amici* submit that the Administrator's interpretation of CAA § 109(b)(1) is contrary to the appropriate background rule of statutory construction. We have endeavored to demonstrate that the statute is clear and that its text permits consideration of economic and social costs and risk significance. But even if we are

wrong -- if the statute is not as clear as we believe -- then at a minimum, the Administrator must acknowledge that the statute does not contain an express prohibition on the consideration of such factors. We submit that the proper rule of construction is to resolve any such ambiguity in favor of permitting consideration of social costs and risk significance, absent a clearly expressed Congressional intent to the contrary.[10]

Though this Court has never clearly adopted such a rule of construction, it is a logical outgrowth of Congress's practice of delegating substantial discretion to administrative agencies. When, for example, the Federal Aviation Administration is tasked with the "substantial restoration of the natural quiet" of the Grand Canyon, there is no reason to suppose that in deciding how substantial the restoration should be the FAA cannot consider the costs that will be borne by the air tourism industry. *See Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998); *see also Michigan v. EPA*, 213 F.3d 663, 2000 WL 180650, at *12 (D.C. Cir. 2000) (permitting consideration of cost absent clear expression of Congressional intent to preclude consideration). Thus, in *amici*'s view, Congress generally enacts statutes with the intention that they be read to authorize regulations with benefits "roughly commensurate with their costs." Sunstein, *Interpreting Statutes in a Regulatory State*, 103 HARV. L. REV. 405, 457 (1989).

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[10] As this Court said in *Benzene*, 448 U.S. at 646, such a rule of construction may be Constitutionally mandated to avoid serious delegation issues. We address here, however, only the prudential concerns, leaving the Constitutional question for resolution in the companion case, No. 99-1257.

In sum, as this Court said in an unrelated context: "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). Here, the Administrator has adopted precisely such a simplistic and untenable presumption; her interpretation of § 109(b)(1) must be rejected.

II. Passage Of The Clean Air Act Amendments In 1990 Did Not Ratify The Rule In *Lead Industries*

In defense of the NAAQS final rules, the Administrator relies on the actions of a subsequent Congress which, in 1990, reauthorized the Clean Air Act without making any change in the operative language of CAA § 109(b)(1). From this reauthorization, the Administrator infers Congressional acquiescence in the *Lead Industries* interpretation of the Act. But such an inference is unwarranted. Indeed, any general theory of statutory interpretation that places significant reliance on Congressional failure to modify a statute in light of an intervening judicial decision is contrary to the provisions of the Presentment Clauses of the Constitution and the principles of separation of powers. It also ignores the realities of the legislative process.

A. Reliance On Legislative Inaction Violates The Presentment Clauses

Congress exercises its legislative power only through the process of legislative enactment specified in

the Constitution. As this Court held in *INS v. Chadha*, 462 U.S. 919, 957 (1983), that process requires compliance with "[t]he bicameral requirement, [and] the Presentment Clauses," followed by the President's approval of the legislation (or an override of his veto). These requirements are not mere empty formalities -- rather the "bicameral requirement and the Presentment Clauses serve essential constitutional functions." *Id.* at 951. They are the bedrock foundation of the Constitution, "intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power." *Id.* at 957.

One necessary implication of the holding in *Chadha* is that Congressional silence or inaction may not be read by the courts as approval of a prior judicial interpretation of an existing statute. All legislative acts, after *Chadha*, require legislative enactment. Reading Congressional silence as approval of a judicial decision effectively treats Congressional silence as an exercise of the legislative power, without that exercise comporting with Constitutional requirements.

As the Court said in *Chadha*, in determining whether an act is legislative in character this Court must look to "its character and effect,'" *id.* at 952 (quoting S.Rep. No. 1335, 54th Cong. 2d Sess., 8 (1897)), not its form. Interpreting Congressional inaction as affirmative approval of a judicial interpretation (or an administrative interpretation) is indistinguishable from an affirmative Congressional enactment of the judicial (or administrative) interpretation as positive law. Indeed, the quintessential hallmark of a legislative enactment is that it constitutes "law" -- that is, that courts use it as an expression of what the statutory law is. *See* Black's Law Dictionary 884 (6th ed. 1990) (defining "law" as including statutory enactments). When legislative inaction is

treated as a substantive adoption of a judicial or administrative rule the courts imbue that inaction with both "legislative" character and effect.

This highlights the fundamental flaw in a principle of statutory interpretation that relies on an unexpressed subsequent Congressional intent as determinative. It is not consistent with *Chadha*. As the Court said: "To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." 462 U.S. at 958, n.22.

It is true that, in the past, this Court has on occasion relied upon Congressional inaction in concluding that Congress has ratified (or consented to) a prior judicial or administrative decision. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982) (relying on failure to disturb judicial decision in later revision of law); *Bob Jones University v. United States*, 461 U.S. 574 (1983) (relying on Congressional failure to repeal administrative interpretation); *Haig v. Agee*, 453 U.S. 280 (1981) (same); *Zemel v. Rusk*, 381 U.S. 1 (1965) (same); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1914) (Congressional failure to limit Presidential exercise of Executive power). But each of these cases is readily distinguishable on the simple ground that it arose prior to *Chadha*.[11] While it might

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[11] Candor compels the acknowledgment that the decision in *Bob Jones University* preceded *Chadha* by only a month. Nevertheless, precede *Chadha* it did. Moreover, the Court reached its decision in *Chadha*, when squarely faced with the question of Constitutional limits on Congressional legislative powers, in the face of the dissent's direct reliance on *Bob Jones* as a counter-example. 463 U.S. at 991 (White, J., dissenting). Thus, *Chadha* can only be read as a rejection of

have been appropriate for this Court to rely on Congressional silence as equivalent to legislative approval before it adopted the construction of the Presentment Clauses embodied in *Chadha* that interpretive methodology can no longer be sustained.[12]

Nor can the implications of *Chadha* be evaded by attempting to recharacterize Congressional inaction as Congressional action. Congress's decision to reauthorize the Clear Air Act in 1990 cannot be fairly characterized as an affirmative adoption of the *Lead Industries* rule. As even the Administrator is obliged to concede, Congress did not amend CAA § 109(b)(1) in any relevant respect. *See* U.S. Opp. 14 ("Congress did not change the substantive criteria for setting and revising NAAQS" in 1977); *id.* at 15 ("Congress . . . did not change the legal standard on which NAAQS are based" in 1990). And, as *amici* can attest, legislative enactments that are carried

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the *Bob Jones* interpretive methodology. Of equal significance, as the Court acknowledged in *Bob Jones*, its reliance on Congressional inaction was one of two alternative grounds for its decision. Ultimately, the Court found that Congress had "affirmatively manifested its acquiescence in the IRS policy [at issue in *Bob Jones*] when it enacted" other provisions of the Internal Revenue Code. 461 U.S. at 601.

[12] The only post-*Chadha* case that might be read to rely on Congressional inaction as an interpretive tool is *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000). For reasons we discuss, *infra*, we do not understand *Brown & Williamson* to overrule *Chadha sub silentio*. Moreover, in our view, *Brown & Williamson* does not truly involve Congressional inaction.

forward in reauthorization without change are often given little (if any) substantive consideration.[13]

Thus, it is simply untenable to characterize this sort of non-consideration as a legislative enactment; it bears little (if any) resemblance to the paradigm of the legislative process mandated by *Chadha*. "The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority." 462 U.S. at 958, n.22.[14] Allowing legislative silence by a subsequent Congress to be used as a tool of statutory construction simply does not comport with Article I requirements.[15]

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[13] In this regard CAA § 109(b)(1) is typical. During reauthorization in 1990, no substantive reconsideration was given to the legal standards embodied in CAA § 109(b)(1). No amendments were proposed to that provision; no votes were taken in either the House or the Senate.

[14] President Bush was apparently of the view that the reauthorization of the Clean Air Act did not adopt the reasoning of *Lead Industries*. As he said upon signing the Act: "To address the serious concerns raised by the cost of this legislation, I am directing Bill Reilly, Administrator of the Environmental Protection Agency, to implement this bill in the most cost-effective manner possible. . . . These implementation strategies will help keep unnecessary costs and job losses down, while ensuring the achievement of the environmental goal of this bill in the most efficient manner possible." *See* "Statement on Signing the Bill Amending the Clean Air Act November 15, 1990" *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, Vol. I at 727-28.

[15] Thus, our view is that the method of statutory analysis adopted in *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative

B. Reliance on Legislative Inaction Violates Separation of Powers Principles

Underlying the Presentment Clauses analysis this Court utilized in *Chadha* is an equally fundamental, yet distinct dimension of the analysis. "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (*per curiam*). Sometimes, as in *Chadha*, those principles find animation in particular textual provisions of the Constitution. Often, however, application of the principles springs from the "'very structure' of the Constitution that exemplifies the concept of separation of powers." *Miller v. French*, 2000 WL 775572 at *9 (U.S. June 19, 2000) (quoting *Chadha*, 462 U.S. at 946). Those structural principles preclude giving interpretive effect to Congressional inaction.

"Separation of powers was designed to implement a fundamental insight: concentration of powers in the hand of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). Thus, as Madison wrote of the principle of separation of powers: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." THE FEDERALIST No. 47 (J. Cooke ed. 1961). Where "the whole power of

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or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"), simply cannot be squared with and does not survive this Court's decision in *Chadha*.

one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." *Id.*

This Madisonian concern -- what this Court appropriately characterizes as fear of the "hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power," *Chadha*, 463 U.S. at 591 -- reflects a anxiety that one branch will, through its actions, seek to encroach on the powers of another and aggrandize to itself greater power. *Mistretta v. United States*, 488 U.S. 361, 382 (1989). For this reason, the Court has routinely struck down, on separation of powers grounds, actions that unify in a single branch power more appropriately diffused among the several branches or that undermine the authority of one coordinate branch for the benefit of another. *Id. See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997) (legislative enactment encroaching on judicial function); *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (legislative agent exercising executive function); *Bowsher v. Synar*, 478 U.S. 714 (1986) (legislative branch exercising executive removal authority); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Article I judges exercising Article III powers).

Conversely, where a statute poses no danger of encroachment or aggrandizement, separation of powers concerns do not require invalidation. *See, e.g., Miller v. French*, 2000 WL 775572 (U.S. June 19, 2000) (approving legislative limitation on judicial procedures); *Morrison v. Olson*, 487 U.S. 654 (1988) (approving judicial appointment of inferior Executive officer). Thus, the separation of powers principle insures that one branch of government not intrude upon the legitimate sphere of

another. *See City of New York,* 524 U.S. at 450 (Kennedy, J., concurring) ("when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two").

A theory of statutory interpretation construing legislative silence as legislative assent is an assault on the fundamental separation of powers principles inherent in the structure of the Constitution. Wholly apart from the textual requirements attending the enactment of particular legislation, to read legislative inaction as approval would work a wholesale redistribution of power from the Legislative to the Executive branch. No longer would Congress be able to serve as a check on Executive power. Rather, the Executive could readily act to extend the outer bounds of its authority and if, for whatever reason, Congress did not affirmatively act to check that excess, the Judiciary would construe that inability as acquiescence.

But this stands the concept of checks and balances on it head -- separation of powers exists to establish an *ex ante* restriction on the abuse of power, not as an expression of the opportunity for the Legislative branch to act *ex post* to redress an imbalance created by Executive abuse. Indeed, given the structural ability of the Executive to frustrate a Legislative response through the use of the veto power, the doctrine of acquiescence by silence is, in practice, a license for Executive expansion of its power so long as one-third of the Members of either the House or Senate are willing to sustain a Presidential veto of corrective legislation. *Amici* greatly fear the growth in Executive power that flows from this mistaken interpretative principle.

Nor will it do to respond that this diminution of Legislative power is ameliorated by the availability of judicial review. The cannon of construction at issue -- ratification by silence -- reflects a conscious decision of the Judicial branch to refrain from invalidating certain assertions of Executive power. In effect, the courts become complicit (through their rules of statutory interpretation) in an Executive raid on the Legislative function. This is precisely the sort of encroachment and aggrandizement that the principle of separation of powers precludes; *amici* respectfully submit that, as a cannon of construction, the doctrine of ratification by acquiescence cannot be Constitutionally permissible.

The instant case presents a paradigm example. Here, the Administrator has acted in a manner that *expands* the jurisdiction of the Environmental Protection Agency. The indisputable effect of her assertion of authority to lower the NAAQS in the manner she has done is to sweep far greater number of individuals and American businesses within the regulatory ambit of the Agency.[16]

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[16] The Administrator's decision to do so came, in the case of the particulate matter NAAQS, despite her high degree of "*uncertainty* in the characterization of health effects attributable to exposure to ambient PM." 62 Fed. Reg. at 38,655 (emphasis supplied). Whatever may be said about the respective powers of the Legislative and Executive branches, it cannot be gainsaid that the resolution of policy uncertainties is the province of the American public's elected representatives, not its unelected (and only indirectly accountable) bureaucracy. The contrary rule, inherent in the Administrator's submission, would work a sea change in the distribution of power, to the significant detriment of political accountability.

But this assertion of greater regulatory authority is precisely the sort of "hydraulic" expansion that this Court's separation of powers teachings counsel should be viewed with grave concern. It plainly does not come with any affirmative legislative enactment. Nor does it come with any assurance that a majority of Congress (as constituted in 1990) approved of that interpretation. Nonetheless, the Administrator would have this Court infer from legislative inaction Congressional approval of this expansion of Executive authority. In *amici*'s view, the quintessential legislative prerogative (in concert with an appropriate Presidential approval or veto) is to define the scope of the law and make the bedrock policy decision of to whom a law should apply. Here, the Administrator's interpretation has stripped the Legislative branch of that prerogative and aggrandized to the Executive branch that power.

Recognition of this separation of powers principle serves to distinguish this case from the Court's recent decision in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000). In *Brown & Williamson*, the Court reviewed subsequent legislative actions relating to tobacco, reading them *in pari materia* with Congressional silence concerning the scope of the FDA's direct authority over tobacco products. But one should not read *Brown & Williamson* as using Congressional silence to infer approval of a regulatory action.

In *Brown & Williamson* the alleged Congressional acquiescence accompanied an Executive abnegation of power. The FDA had, historically, *declined* to assert an expanded tobacco jurisdiction. That refusal posed no threat to the Legislative branch and did not reflect an effort to broaden the jurisdictional reach of an Executive agency at the expense of Congress's authority to speak to the fundamental legal and policy questions presented by

such an extension. Indeed, it is somewhat conceptually skewed to treat Congressional acquiescence in Executive *inaction* on the same footing as alleged acquiescence in Executive *action*. In the former case (exemplified by *Brown & Williamson*) the *status quo* in the balance between Legislative and Executive powers is maintained. In the later case (at issue here) the Executive action upsets the balance and alters the *status quo*.

In *amici*'s view, the two situations are distinct. When both Congress and the Executive branch *decline* to exercise their powers, no danger of encroachment is posed and separation of powers principles do not require that the Judicial branch ignore that joint Legislative/Executive acceptance of the *status quo*.[17] That situation poses no threat to *amici*'s role as legislators and their Constitutional responsibilities. Conversely, when the Executive seeks to expand its power and upset the *status quo*, the cannon of ratification by inaction "undermine[s] the authority and independence" of the Legislative branch by reassigning the legislative power to the Executive branch. *Mistretta*, 488 U.S. at 382.

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[17] Thus, *amici*'s experience is that Congress is unlikely to delegate a policy decision of great economic and political magnitude to an administrative agency. *Cf. Brown & Williamson*, 120 S.Ct. at 1301. Those are issues the citizens expect *amici* to address in their legislative capacity and, absent an express statement to the contrary, should be presumed reserved to Congress.

C. Legislative Inaction Is An Ambiguous Indicator Of Congressional Views

Beyond the Constitutional barriers to reliance on subsequent legislative inaction, any theory of statutory construction that gives substantial weight to inaction as indicative of Congressional intent is inconsistent with the realities of the legislative process. As *amici* can attest, and as this Court has often said, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 381 U.S. 204, 313 (1960); *see also CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (same); *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963) (same).

This is especially so in the case of legislative failure to act. Given the institutional barriers to successful legislative enactment, failure to amend a statute can result from any number of causes. *See Vinyl Chloride*, 824 F.2d at 1162 & n.10. It may be the product of endorsement or ratification (as the Administrator would suggest). But sometimes it is the product of passivity, indecision, or indifference. Sometimes the Congress cannot act even though a majority disapproves of a judicial or administrative interpretation because, the procedural rules of the Senate or House permit a minority to block substantive consideration of a legislative proposal.

For these practical reasons, in amici's experience subsequent legislative inaction is of virtually no weight in determining legislative intent. *Cf., United States v. Wise*, 370 U.S. 405, 411 (1962). "Such non-action by Congress affords the most dubious foundation for drawing positive inferences." *Price*, 381 U.S. at 310-11. Congressional inaction lacks "persuasive significance"

precisely because any number of "equally tenable inferences" may be drawn from inaction. *Wise*, 370 U.S. at 411; *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 630, 650 (1990) (same); *Haynes v. United States*, 390 U.S. 85, 87-88, n.4 (1968) (same); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring).

Here, to the extent Congress spoke at all in 1990, it rejected the Administrator's view and attempted to limit and restrain regulatory expansion. Congress directly addressed the problem of ozone pollution in adopting the Clean Air Act amendments in 1990, effectively codifying the then-existing ozone NAAQS of 0.12 parts per million. *See* Title I, Part D, Subpart 2, Pub. L. No. 101-549, CAA § 181 (codified at 42 U.S.C. § 7511). Concurrently, Congress directed the EPA to conduct a comprehensive study of the impact of the Act on the "public health, economy, and environment of the United States" including, particularly, the requirement to "consider the costs, benefits and other effects associated with compliance with each [NAAQS]." CAA § 312(a). And, most significantly, in creating a scientific review committee to advise the Administrator on revisions to the NAAQS, Congress required that it report to the Administrator on any "adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such [NAAQS]." CAA § 109(d)(2)(C)(iv).

This modest subsequent history contrasts sharply with that at issue in *Brown & Williamson*. In *Brown & Williamson* the Court was not faced with a single, ambiguous statutory reauthorization. Rather, the FDA's new assertion of jurisdiction ran contrary to 35 years of Congressional enactments relating to tobacco, 120 S.Ct. at 1312, including express consideration and rejection of

bills that would have extended the FDA's authority, *id.* at 1309. As this Court noted, it did not rely on Congress' failure to act as a ground for decision; instead, the decision rested on the enactment of a comprehensive legislative scheme that made sense only if read *in pari materia* with a rejection of FDA's tobacco jurisdiction. *Id.* at 1312-13. Thus, *Brown & Williamson* is "not a case of simple inaction by Congress that purportedly represents acquiescence in an agency's position" and is not in conflict with the position *amici* espouse here. *Id.* at 1312.

In sum, in the case of the Clean Air Act, subsequent Congressional enactments (unlike those at issue in *Brown & Williamson*) cannot possibly be read as an affirmative adoption of the *Lead Industries* rule. The most that can be said is that Congress was divided and uncertain and therefore was unable or unwilling to legislate any modification of CAA § 109. This is a far and distant cry from legislative silence that betokens assent.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed on the alternate grounds presented by the cross-petition.

Respectfully submitted.

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In the

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, et al.,

Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF CROSS-PETITIONERS AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

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QUESTION PRESENTED

Whether section 109 of the Clean Air Act requires that the Environmental Protection Agency must, in setting national ambient air quality standards, ignore all factors other than health effects relating to pollutants in the air.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the California Chamber of Commerce respectfully request leave of the Court to file this brief amicus curiae in support of Cross-Petitioners American Trucking Associations, Inc., *et al.*[1] Counsel for American Trucking Associations and the government have granted consent for the filing of this brief. Original letters of consent will be lodged with this Court. However, not all parties have responded, necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, public interest organization with thousands of supporters nationwide. Since its establishment in 1973, PLF has researched and litigated a broad spectrum of public interest issues. PLF advocates a balanced approach to agency rulemaking and supports the concept that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved.

PLF devotes substantial resources to litigation involving environmental issues and becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the court in resolving the underlying legal issues. PLF's Board has approved amicus participation in this case.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae affirm that no counsel for any party in this case authored this brief in whole or part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF has participated in numerous cases involving the interpretation of federal environmental laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in *Steel Company v. Citizens for a Better Environment*, United States Supreme Court No. 96-643 (pending); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

PLF's public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

The California Chamber of Commerce (Chamber) is the largest and most broadly based employer representative in California with a membership base of more than 11,000 businesses. These businesses represent every sector of industry--small, medium, and large--and employ roughly 1.9 million people.

The California Chamber of Commerce recognizes the importance of clean air to protect human health and the environment; however, the Chamber has serious concerns about the economic impacts the Environmental Protection Agency's (EPA) revised National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) and ozone will have on California business. These rules have been promulgated despite the fact that California's air is significantly cleaner than it was 25 years ago and is getting better all the time. In addition, California is already operating under the most stringent air quality rules in the nation which places a competitive disadvantage on California businesses. These rules will only exacerbate this problem.

It will be more expensive for California to implement these rules than other states because of the incremental costs in making further emission reductions. Also, pollution controls like best available control technology, onerous permitting fees and stringent enforcement practices will make operations more costly and complicated for businesses that are currently in compliance (or "attainment") areas, but will fall into noncompliance (or "nonattanment") areas because of the stricter rules.

Many of the new "nonattainment areas" have no experience in dealing with such stringent regulations, thus many businesses will move to "cleaner" districts or relocate to other states. In California alone, at least three areas will be added as "nonattainment areas" for particulate matter and ten others for ozone. These areas will have to develop plans by a specific date demonstrating how they will meet the new standards. If these areas do not comply, California could lose valuable highway funds. This will translate into job losses and reduced economic opportunities. Higher costs incurred by industries, including aerospace, electronics, energy, and pharmaceuticals, will only discourage new businesses and the expansion of existing facilities. One study predicts that California could lose over 10,000 jobs. Moreover, according to the Reason Public Policy Institute, the new standards could cost California $9.1 billion to implement.

The Pacific Legal Foundation and the California Chamber of Commerce are particularly concerned about the unwillingness of EPA to consider impacts on small business and the lower court's determination that EPA must not consider costs and technological feasibility in setting air quality standards. This is particularly troubling because of concerns that the rules are not based on sound science.

According to the National Center for Policy Analysis (NCPA), *Brief Analysis*, No. 236, July 17, 1997, even members of EPA's own Clean Air Scientific Advisory Committee

(CASAC) disagree on the need for stricter standards. Although the EPA Administrator claims the science supporting the new rules is indisputable, CASAC was split on what standards to set, if any. "Eight committee members thought no standards are justified because there is no clear evidence that setting a standard would yield tangible health benefits." *Id.* at 2. The remaining 13 members of the committee could not agree on whether current standards are too strict or not strict enough. *Id.*

Also, NCPA reports that the public never had an opportunity to review the relevant scientific data because the primary studies used to justify the ozone standards have never been released by the Harvard researchers--not even to the EPA. *Id.* Moreover, there is evidence that the new standards may have an adverse effect on public health and welfare.

Initially, the EPA estimated the new standard for particulate matter alone would save annually more than 40,000 people from premature death. *Id.* But later, the EPA "revealed that this figure is the total number of lives estimated to be saved by *all* clean air regulations." *Id.* (emphasis in original). Then the EPA claimed that 20,000 lives would be saved per year by the new particulate matter standard--50% less than its original estimate. *Id.* Three months after proposing the standard, "the EPA once again reduced its estimate after an outside researcher found a simple mathematical error in one of [EPA's] key studies." *Id.* "This time the EPA reduced the estimated lives saved by another 25 percent, to 15,000." *Id.* "The discovery of this error has led some analysts to question the EPA's entire statistical analysis." *Id.* It was Dr. Kay Jones, former senior advisor on air quality at the President's Council on Environmental Quality during the Carter administration, who discovered the error. Dr. Jones completely reanalyzed the EPA's estimates and concluded the number is closer to 840 lives. *Id.*

Moreover, ground-level ozone has health benefits EPA ignored. Ozone screens out potentially deadly ultraviolet

radiation. *Id.* According to the Department of Energy, the required ozone reduction would: (1) "Increase malignant cancers, causing 25 to 50 new deaths a year;" (2) "Cause as many as 260 new cases of cutaneous melanoma and 11,000 new cases of nonmelanoma skin cancer;" and (3) "Cause between 13,000 and 28,000 new incidences of cataracts each year." *Id.*

This is the type of balanced analysis the EPA should do, but has not done, to ensure its environmental regulations are reasonable and beneficial. Clearly, this case will set a precedent affecting numerous statutory schemes and literally millions of lives. Regulations that impose bureaucratically defined concepts for safety, environmental protection, or economic relationships must take into account the economic and social costs of those regulations.

For the foregoing reasons, Pacific Legal Foundation and the California Chamber of Commerce move to file a brief amicus curiae in this case.

DATED: July, 2000.

Respectfully submitted,

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STATEMENT OF THE CASE

The Clean Air Act sets up a scheme to regulate air pollutants the "emissions of which, in [the Administrator's] judgment cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). The Administrator must publish "air quality criteria" for these pollutants and establish national ambient air quality standards ("NAAQS") based on these criteria. *See id.* at §§ 7408-09. The standards are of two types--"primary" and "secondary." A "primary" standard indicates a concentration level "requisite to protect the public health" with an "adequate margin of safety." Whereas a "secondary" standard indicates a concentration level "requisite to protect the public welfare." *Id.* § 7409(b).

On July 18, 1997, the Environmental Protection Agency adopted new, stricter national ambient air quality standards for ground-level ozone (smog) and particulate matter (soot). Public outcry over the severity of these standards resulted in congressional oversight hearings and scores of suits from industry, states and other parties challenging the legality of the standards. Among others, the grounds for suit included an argument that the EPA construed Sections 108 and 109 of the Clean Air Act "so loosely as to render them unconstitutional." *American Trucking Associations v. Environmental Protection Agency*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (*ATA*). The Court of Appeals agreed:

> Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM [particulate matter] are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 72 L. Ed. 624, 48 S.Ct. 348

> (1928). Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

ATA, 175 F.3d at 1034.

EPA regards ozone definitely, and PM likely, as nonthreshold pollutants, or pollutants that have some possibility of adverse health effects at any level above zero. Thus, the court found EPA's explanations for choosing one standard over another amounted to nothing more than assertions that stricter standards mean less pollution and less harm while less strict standards mean more pollution and more harm. According to the court:

> Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety," the formula set out by § 109(b)(1).

Id. at 1035.

Another ground for suit was the claim that the EPA must consider costs, technological feasibility, and other nonhealth factors in setting the ozone and PM standards. However, the court rejected this claim. Specifically, with respect to costs, the court held: "As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards. *See Lead Industries*, 647 F.2d [1130,] 1148 (DC Cir. 1980)." *Id.* at 1040.

The court also rejected the argument that EPA erred in failing to consider detrimental health effects that are traceable to the cost of complying with the revised national ambient air quality standards. Citing a previous decision in the D.C. Circuit, the court held "it is only health effects relating to pollutants in the air that EPA may consider." *Id.* at 1041.

Nevertheless, the court did hold that EPA must consider not only the maleficent effects of a pollutant but also the beneficent effects. The court observed that the presence of ground-level ozone causes respiratory problems in some people but it also shields people from the deleterious effects of ultraviolet radiation that can cause certain forms of cancer. *Id.* at 1052.

Ultimately, the court determined that the standards not only violated the nondelegation principle but that the ozone standard could not be enforced due to restrictions in other provisions of the Clean Air Act. The court also invalidated the PM standard as arbitrary and remanded to the agency to select a new standard.

Both sides filed petitions for writ of certiorari in this Court. The EPA sought review of the nondelegation determination, among other things, while the opposing parties sought review of the scope of section 109. Review was granted in both instances and separate briefing is required in each case. This case deals with the authority of the EPA to consider costs, technological feasibility, and other nonhealth factors under section 109 in setting ambient air quality standards.

SUMMARY OF THE ARGUMENT

Section 109 of the Clean Air Act requires the EPA to set ambient air quality standards to protect public health and welfare, but with "an adequate margin of safety." That term implies discretion and requires the EPA to consider nonhealth factors. In interpreting a similar term under section 112, that requires the EPA to set standards for hazardous pollutants with

"an ample margin of safety," the D.C. Circuit Court of Appeals determined that term does not preclude the EPA from considering costs, technological feasibility or other nonhealth factors. Rather, the court determined the text of the statute granted considerable discretion to the EPA to set emission standards and that such discretion is necessary because of the scientific uncertainty associated with determining a safe level of exposure for substances for which there may be no "risk-free" limit. The court held that a determination of what is "safe" must be made only with a consideration of health-related factors, but that the EPA had wide latitude in what it could consider to set the appropriate margin of safety.

That case is instructive in interpreting section 109. The language of section 109 is almost identical to the language of section 112. Therefore, the term "adequate margin of safety" should be understood to mean, as with section 112, that EPA can consider nonhealth factors in setting NAAQS. In fact, since ozone and particulate matter are considered "nonthreshold" substances--substances that may affect health at any exposure level above zero--it would be hard to credit how the EPA could set an "adequate margin of safety," except at zero emissions, without a consideration of nonhealth factors.

Additionally, the determination of the court below, in this case, that the EPA must consider the beneficial health effects of ozone, is at odds with the court's determination that the EPA cannot consider other factors, including health impacts induced by the EPA's own air quality standards. Below, the court held it would "seem bizarre" if the agency could only consider half of the health impacts of a substance regulated under a statute designed to protect public health and welfare. Likewise, it would seem bizarre if the EPA could not consider the net health impacts of an air quality standard it imposed on the public. It is a fact of life that increased regulatory costs contribute to unemployment and poverty that in turn increase health risks and even death. If the requirement of an "adequate margin of

safety" is to mean anything, it must mean that EPA has considered all related health effects and made a balanced judgment that the air quality standards will provide a net benefit to public health and welfare.

This Court cannot ignore or countenance EPA's disregard for public safety by a crabbed reading of the Clean Air Act. For these reasons, this Court should rule that EPA not only may, but must, consider all health and nonhealth factors that bear on the margin of safety.

ARGUMENT

I

THE TERM "ADEQUATE MARGIN OF SAFETY" IN SECTION 109 OF THE CLEAN AIR ACT, AND THE INHERENT SCIENTIFIC UNCERTAINTY ASSOCIATED WITH SETTING HEALTH-RELATED STANDARDS, INDICATES CONGRESS' INTENT THAT THE EPA EXERCISE ITS DISCRETION IN DETERMINING THE FACTORS TO CONSIDER IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS

The question as presented in this case is whether EPA may consider costs or other nonhealth effects in setting the NAAQS. Under the Clean Air Act, EPA must set air quality standards "requisite to protect the public health" and "welfare" with an "adequate margin of safety." Section 109(b) of the Clean Air Act, 42 U.S.C. § 7409(b). The answer given this question by the court below was, "no." Relying on its own precedent, the Court of Appeals held: "As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards. *See Lead Industries*, 647 F.2d at 1148." *ATA*, 175 F.3d at 1040. However, subsequent to the court's decision

in *Lead Industries Association v. Environmental Protection Agency*, 647 F.2d 1130 (D.C. Cir. 1980), another panel of the same court decided *Natural Resources Defense Council v. Environmental Protection Agency*, 824 F.2d 1146 (D.C. Cir. 1987) (*Vinyl Chloride*). Although the court in the latter case did not overrule the former, and another section of the Act was at issue, the case offers an instructive analysis for interpreting section 109 of the Clean Air Act.

In *Vinyl Chloride*, the petitioner argued that the EPA must regulate carcinogenic air pollutants under section 112 of the Clean Air Act without regard for nonhealth factors and, therefore, the uncertainty about the health effects of carcinogenic substances requires the EPA to prohibit all emissions. Section 112 of the Act provides a means for regulating hazardous air pollutants for which no ambient air quality standards apply and that may result in increased mortality or irreversible illness. See 42 U.S.C. § 7412(a)(1). Similarly to section 109, the Act directs the EPA to designate an emission limit under section 112 "at the level which in [the Administrator's judgment] provides an ample margin of safety to protect public health." *See id.* at § 7412(b)(1)(B).

The case involved vinyl chloride that the EPA designated "an apparent nonthreshold pollutant," meaning there is no safe level of human exposure. *Vinyl Chloride*, 824 F.2d at 1148. Consequently, the EPA considered two alternative interpretations of its duty under section 112 of the Clean Air Act. Under the first alternative, EPA would have to ban all emissions because "a zero emission limitation would be the only emission standard which would offer absolute safety from ambient exposure." 40 Fed. Reg. 59,532, 59,534 (1975). But, the EPA decided against this interpretation because "complete prohibition of all emissions could require closure of an entire industry." *Id.* This cost was too high, in the mind of the EPA, given that the health risk was of unknown dimension. *See id.*

Under the second alternative, EPA would have to set emission standards for nonthreshold pollutants that require emission reductions to the lowest level possible by use of the best available control technology. EPA adopted this interpretation arguing it would "produce the most stringent regulation of hazardous air pollutants short of requiring a complete prohibition in all cases." *Id.* When the EPA finally adopted vinyl chloride emission standards based on this interpretation, the agency was sued for relying on cost and technology considerations rather than exclusively on health factors.

In an opinion authored by Judge Bork, the court framed the question for review--not unlike the question in this case--as whether the Clean Air Act adopts an exclusive focus on health such that "the Administrator must set a zero level of emissions when he cannot determine that there is a level below which no harm will occur." *Vinyl Chloride*, 824 F.2d at 1152. The court adopted the *Chevron* standard of review; whether "Congress has directly spoken to the precise question at issue." *Id.* (citing *Chevron, USA, Inc, v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)). And, "if so, 'that intention is the law and must be given effect.'" *Id.* "'If the statute is silent or ambiguous with respect to the specific issue,' then we accept an agency interpretation if it is reasonable in light of the language, legislative history, and underlying policies of the statute." *Id.*

Turning first to the language of the Act, the court noted that section 112 requires EPA to set an emission standard for hazardous air pollutants that in the Administrator's judgment would provide "an ample margin of safety." This directive is reflective of section 109 (under consideration in the case at bar) that requires "an adequate margin of safety" for national ambient air quality standards. The court found this language inconsistent with NRDC's argument that the EPA has no discretion in setting emission standards for pollutants with uncertain risks. The statute did not define "ample margin of

safety." However, Judge Bork observed that the Senate Report discussed a similar requirement in the context of setting NAAQS under section 109. The report explained the purpose of the "margin of safety" is to provide "a reasonable degree of protection . . . against hazards which research has not yet identified." S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970). According to the court, this definition comported with the "historical use of the term in engineering as 'a safety factor . . . meant to compensate for uncertainties and variabilities.'" *Vinyl Chloride*, 824 F.2d at 1152.

The court concluded:

> Congress' use of the word "safety," moreover, is significant evidence that it did not intend to require the Administrator to prohibit all emissions of non-threshold pollutants. As the Supreme Court has recently held, "safe" does not mean "risk free." *Industrial Union Dep't AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 642, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980). Instead, something is "unsafe" only when it threatens humans with "a significant risk of harm."

Id. at 1153.

Thus, the court determined the NRDC's view would eliminate any discretion and render the term "ample margin of safety" meaningless.

> Had Congress intended that result, it could very easily have said so by writing a statute that states no level of emissions shall be allowed as to which there is any uncertainty. But Congress chose instead to deal with the pervasive nature of scientific uncertainty and the inherent limitations of scientific knowledge by vesting in the Administrator the discretion to deal with uncertainty in each case.

Vinyl Chloride, 824 F.2d at 1153.

With respect to the legislative history, the court found no support for NRDC's position. If anything, the court concluded, the history cuts the other way.

> To accept the petitioner's contention that section 112 *requires* the Administrator to prohibit all emissions of non-threshold pollutants, we would have to conclude that, without even discussing the matter, Congress mandated massive economic and social dislocations by shutting down entire industries. That is not a reasonable way to read the legislative history.

Id. at 1154.

At most, the court found, "The Legislative history is simply ambiguous with respect to the question of whether the Administrator may permissibly consider cost and technological feasibility under section 112." *Id.* at 1157. So it is in the present case. Parties on both sides of the issue cite to the legislative history for support.

Since NRDC argued, much like the EPA argues in the present case, that the EPA is never permitted to consider cost and technological feasibility under section 112, but is limited to health factors alone, the court had to determine whether EPA could consider cost and technological feasibility at all. This parallels the question presented in this case.

The court determined that section 112, on its face did not suggest Congress intended to prohibit the consideration of any particular factor. *Id.* Rather, the court believed that although the term "to protect the public health" shows an intent to make health the primary consideration, the language does not specify

the factors the EPA may consider in the "judgment" of the Administrator to ensure "an ample margin of safety." *Id.*

> Instead, the language used, and the absence of any specific limitation, gives the clear impression that the Administrator has some discretion in determining what, if any, additional factors he will consider in setting an emission standard.

Id. at 1155.

But the petitioner argued that the structure of the Clean Air Act, the Supreme Court's interpretation of section 110 in *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246 (1976), and the D.C. Circuit Court's interpretation of section 109 in *Lead Industries* precludes a consideration of costs and technological feasibility. The court responded, however, that in those other cases the courts "rejected an argument that the EPA must consider cost and technological feasibility as equal factors in importance to health" and "[w]e reject the same argument here." *Id.*, 647 F.2d at 1157. Nevertheless, the court held, "these decisions do not provide precedential support for the petitioner's position that, as a matter of statutory interpretation, cost and technological feasibility may never be considered under the Clean Air Act unless Congress expressly so provides." *Id.*

In *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246, this Court concluded that "[w]here Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Id.* at 257 n.5. However, in *Vinyl Chloride*, Judge Bork stated:

> We simply do not, as the NRDC does, read these statements as announcing the broad rule that an agency may never consider cost and technological feasibility, under any delegation of authority, and for any purpose, unless Congress specifically provides

> that the agency is authorized to consider these factors. At most, we believe that these statements stand for the proposition that when Congress has specifically directed an agency to consider certain factors, the agency may not consider unspecified factors. Because Congress chose not to limit specifically the factors the Administrator may consider in section 112, this discussion in *Union Electric* is not in point here.

824 F.2d at 1158.

Likewise, *Union Electric* is not on point in the case at bar either. Congress has not dictated all the factors the Administrator may consider under section 109 in setting national ambient air quality standards. Although section 108 sets forth specific air quality criteria on which the NAAQS are based, Congress did not specifically limit the scope of the Administrator's "judgment" to set standards with an "adequate margin of safety" under section 109.

Lead Industries Association v. Environmental Protection Agency, 647 F.2d 1130, is a different matter. In that case, the D.C. Circuit Court of Appeals held that section 109 prohibits the consideration of all nonhealth factors in setting air quality standards. Although the language of section 109, calling for an "adequate margin of safety," is almost identical to the language of section 112, calling for an "ample margin of safety," the court in *Vinyl Chloride* distinguished section 109 from section 112 arguing the court found in *Lead Industries* that the "structure" of the Act dictated a different result in interpreting section 109. But notwithstanding the court's nod to its own circuit precedent, the conclusion that two nearly identical statutory provisions should be read differently is inconsistent with the court's ultimate holding in *Vinyl Chloride* that the language of the Act is determinative.

Ultimately, the court held:

> Since we cannot discern clear congressional intent to preclude consideration of cost and technological feasibility in setting emission standards under section 112, we necessarily find that the Administrator may consider these factors.

Vinyl Chloride, 824 F.2d at 1163.

Nevertheless, the court found that in *Vinyl Chloride* the EPA had drifted into "a zone of impermissible action." *Id.* The court's objection with the standard set by EPA was that the EPA had not determined an acceptable level of risk for vinyl chloride but had "simply substituted technological feasibility for health as the primary consideration." *Id.*

The court found in *Vinyl Chloride* that Congress was primarily concerned with health but, as in the present case, EPA had not determined the effect of the level of emissions on health. Nor had EPA determined a level at which the proscribed emission would be "safe" or provide an "ample margin of safety." *Id.* at 1163.

> We find that the congressional mandate to provide "an ample margin of safety" "to protect the public health" requires the Administrator to make an initial determination of what is "safe." This determination must be based exclusively upon the Administrator's determination of the risk to health at a particular emission level .... The Administrator cannot under any circumstances consider cost and technological feasibility at this stage of the analysis. The latter factors have no relevance to the preliminary determination of what is safe.

Id. at 1164-65.

But, the court found another stage of the analysis, apropos to the case at bar, that would allow, or even require, other considerations.

> Congress, however, recognized in section 112 that the determination of what is "safe" will always be marked by scientific uncertainty and thus exhorted the Administrator to set emission standards that will provide an "ample margin" of safety. This language permits the Administrator to take into account scientific uncertainty and to use expert discretion to determine what action should be taken in light of that uncertainty. . . . It is only at this point of the regulatory process that the Administrator may set the emission standard at the lowest level that is technologically feasible. Because consideration of these factors at this stage is clearly intended "to protect the public health," it is fully consistent with the Administrator's mandate under section 112.

Id. at 1165.

The Administrator's mandate is not meaningfully different under section 109 where the Administrator is required to set NAAQS based first on the objective air quality criteria defined in section 108 and then to designate an emission level "requisite to protect the public health" and "welfare" with an "adequate margin of safety." 42 U.S.C. § 7409(b).

This approach to setting national ambient air quality standards satisfies the clear intent of Congress to establish health-based standards while at the same time recognizing the express directive of the Act for the Administrator to use his "judgment" in setting an "adequate margin of safety." Just like vinyl chloride, EPA regards ozone definitely, and PM likely, as nonthreshold pollutants. As such, an emission standard based solely on health impacts would dictate a complete ban. But, the consideration of other factors, including cost and technological

feasibility, would allow a margin of safety that does not mean "risk-free."

> And while Congress used the modifier "ample" [or "adequate"] to exhort the Administrator not to allow "the public [or] the environment . . . to be exposed to anything resembling the maximum risk" and, therefore, to set a margin "greater than 'normal' or 'adequate,'" Congress still left the EPA "great latitude in meeting its responsibility."
>
> Congress' use of the word "safety," moreover, is significant evidence that it did not intend to require the Administrator to prohibit all emissions of non-threshold pollutants. As the Supreme Court has recently held, "safe" does not mean "risk-free." *Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 642, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980). Instead, something is "unsafe" only when it threatens humans with a "significant risk of harm." *Id.*

Vinyl Chloride, 824 F.2d at 1153.

As a general proposition, it is hard to imagine how the Administrator could ever determine an "adequate margin of safety" for nonthreshold pollutants, like ozone and particulate matter, without considering nonhealth factors. In fact, a strictly health-based determination of safe levels of emissions would require virtually no discretion on the part of the Administrator. Risk alone would dictate a zero emissions standard for ozone and PM. However, as expressed in the statutory purpose, Congress intended a more reasoned approach to air pollution regulation--an approach that was protective of public health and welfare but also one that enhanced "the productive capacity" of the nation. *See* 42 U.S.C. § 7401. This balancing of "health and welfare" with "productive capacity" requires a consideration of nonhealth factors and an exercise of the "great

latitude" the court in *Vinyl Chloride* determined Congress had left the EPA to accomplish its responsibility. *Vinyl Chloride*, 824 F.2d at 1153. Therefore, this Court should conclude that EPA not only may, but must, consider cost, technological feasibility, and other nonhealth factors in setting ambient air quality standards under section 109 of the Clean Air Act.

II

ANY MEANINGFUL APPLICATION OF THE "ADEQUATE MARGIN OF SAFETY" REQUIREMENT MUST TAKE INTO ACCOUNT THE INDIRECT HEALTH EFFECTS RESULTING FROM THE NATIONAL AMBIENT AIR QUALITY STANDARDS THEMSELVES

According to the court below, EPA must consider the beneficial as well as the adverse health effects of ozone. *See ATA*, 175 F.3d at 1052. In support of this position, the court offered a well-reasoned, commonsense rationale. *Id.* However, the court ignored this rationale when it determined that EPA may not consider the health effects that result from EPA's own standards. The court's reasoning is inconsistent.

The beneficial effects of ground-level, or tropospheric, ozone are documented. Ozone acts as a shield against the effects of the sun's harmful ultraviolet rays helping to prevent cataracts and skin cancer. *See id.* at 1051. However, the EPA "explicitly disregarded" these benefits when it estimated the effects of ozone concentration in establishing its ambient air quality standard. *Id.* To justify itself, the EPA claimed to rely on its statutory mandate to base ambient air quality standards on published criteria that are to "reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(2). As the court noted, the term "all identifiable effects" would seem on its face to include beneficial effects. *ATA*, 175 F.3d at 1051.

To avoid this plain reading of the Act, EPA seized on the term "such pollutant" and argued it must consider only those factors that make the substance a "pollutant." However, the Court of Appeals countered that the phrase "pollutant" is "simply a label used to identify a substance to be listed and controlled by the statute." *Id.* And while a substance with no adverse effects whatsoever would not qualify as a "pollutant," the court argued this "fact of nomenclature does not visibly manifest a congressional intent to banish consideration of whole classes of 'identifiable effects.'" *Id.*

Moreover, the court found the legislative history shed no light on the subject and, in any event, that EPA's interpretation of the Clean Air Act failed the reasonableness standard of *Chevron*:

> [I]t seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance. At oral argument even EPA counsel seemed reluctant to claim that the statute justified disregard of the beneficent effects of a pollutant bearing directly on the health symptoms that accounted for its being thought a pollutant at all (suppose, for example, a chemical that both impedes and enhances breathing, depending on the person or circumstances); he also seemed unable to distinguish that case from the one here--where the chemical evidently impedes breathing but provides defense against various cancers.

Legally, then, EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109.

ATA, 175 F.3d at 1052.

This analysis makes good sense. It does seem bizarre that a statute designed to protect health and welfare would not allow a consideration of the net health effect of a regulated substance. It seems equally bizarre, therefore, that the court determined that EPA must disregard the adverse health and welfare effects of its own standards.

State Petitioners in the court below argued that the EPA must "consider the environmental consequences resulting from the financial impact of the [revised ozone and PM standards] on the federal Abandoned Mine Reclamation Fund Act." *ATA*, 175 F.3d at 1041. However, the court determined this argument was precluded by earlier precedent. In *Natural Resources Defense Council v. Administrator*, 902 F.2d 962, 972-73 (D.C. Cir. 1990), the appellate court decided EPA could not consider the health effects of unemployment caused by the EPA's national ambient air quality standards and held EPA may only consider the "health effects relating to pollutants in the air." *See* 42 U.S.C. § 7408(a)(2) ("Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.").

> Unlike the positive health benefits of ozone that we hold the EPA must consider, any detrimental health effects resulting from the financial impact upon the mine fund, like the health consequences of unemployment, are traceable to the cost of complying with the revised $PM_{[2.5]}$ and ozone NAAQS and not to the presence of those pollutants in the air.

ATA, 175 F.3d at 1041.

But this determination is flawed. Section 108 governs the setting of air quality criteria for impacts expected from the presence of "pollutants in the air." However, the establishment of air quality standards requisite to protect the public health and welfare with an "adequate margin of safety" is governed by Section 109. And, as argued above, costs can and should be considered in determining "an adequate margin of safety" because the terms "adequate" and "safety" connote some balancing and judgment on the part of the Administrator. Therefore, even if the establishment of the air quality criteria, upon which the air quality standard is based, must exclude costs, the setting of an "adequate margin of safety" is not so constrained.

But even if a consideration of costs was categorically prohibited by Section 109, which it isn't, the factors Petitioners argued must be addressed in this case were not direct costs but indirect health effects resulting from implementation of the NAAQS. In this case, State Petitioners argued the EPA must consider adverse environmental effects that derive from financial impacts on the mining fund. In *NRDC*, parties argued that implementation of the air quality standard for particulate matter would result in adverse health effects from increased unemployment. It is a well-established, if unfortunate fact of modern life, that as poverty increases health declines.

Some analysts estimate that the revised ozone and PM rules "will eliminate 220,000 jobs and cost the average household about $1,200 per year in discretionary spending." *Brief Analysis*, No. 236, Page 2, National Center for Policy Analysis, July 17, 1997. According to the American Thoracic Society, poverty is the number one risk factor for asthma, therefore, the new rules "will worsen health by increasing unemployment and lowering household income." *Id.* This is the conclusion of Dr. Wendy Gramm, former administrator of the Office of Regulatory Affairs in the United States Office of Management and Budget (OMB), and Susan Dudley, vice

president and director of environmental analysis at Economists, Inc. *Id.* Based on OMB estimates " that for every $9 million to $12 million decline in aggregate personal income one life is lost and EPA cost estimates for the rules, Gramm and Dudley found that the new ozone standard alone could result in 7,000 deaths a year." *Id.*

Surely, any safety margin would be inadequate if it did not account for actual harm to the public resulting from implementation of air quality standards that are supposed to protect public health and welfare. As the Court of Appeals would have it, the EPA could impose air quality standards that caused an actual net health risk to the public, such as 7,000 deaths a year from the rules in this case. This is patently unreasonable. Congress could not have intended such a blind application of the law. Nor does the law countenance absurdities.

If the requirement that the EPA set an "adequate margin of safety" for NAAQS is to mean anything, it must mean that EPA has considered all related health effects and made a balanced judgment that the air quality standards will do more good than harm with respect to public health and welfare. The lower court cannot ignore or countenance EPA's disregard for public safety by a crabbed reading of the Clean Air Act. For these reasons, this Court should rule that the setting of NAAQS does not preclude, indeed requires, a consideration of all related health effects that derive from the regulated substance and the regulation of that substance.

CONCLUSION

EPA must set air quality standards that are protective of public health and welfare. However, Congress gave EPA discretion in determining "an adequate margin of safety" for those standards. The setting of an "adequate" margin of safety

implies that EPA may set a limit above the "zero-risk" level, even for those substances, like ozone and particulate matter, that are nonthreshold pollutants. Thus, by any reasonable interpretation of the term "adequate," EPA must consider nonhealth factors. This Court should so hold.

DATED: July, 2000.

Respectfully submitted,

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No. 99-1426

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,
Petitioners,

vs.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR THE AMERICAN BOILER MANUFACTURERS ASSOCIATION SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

The American Boiler Manufacturers Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in the above-referenced case. The consent of the attorney for Respondent and all Petitioners except one have been obtained. Amicus has attempted but has been unsuccessful in reaching attorney of record for Citizens for Balanced Transportation, et al. Amicus has obtained the consent of the attorney for several individuals who have joined that brief, but has not obtained consent of the counsel of record. Accordingly, the American Boiler Manufacturers Association hereby moves for leave to file the attached brief *amicus curiae*.

The American Boiler Manufacturers Association ("ABMA") represents the manufacturers of commercial, industrial and utility steam generating and fuel burning equipment, as well as suppliers to the industry. ABMA promotes the common business interests of the boiler manufacturing industry and the safe, environmentally friendly use of the products and services of its members. ABMA serves to generate support in state and federal governments for industry concerns, while also informing the public of vitality, environmental consciousness and high-tech orientation of the boiler industry.

Participating as *amicus curiae*, ABMA hopes to aid the Court in its consideration of the writ of certiorari by providing insight into the complexities of setting environmental standards and the need for full consideration of all factors bearing on these decisions.

Respectfully Submitted,

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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,
Petitioners,

vs.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

BRIEF FOR THE AMERICAN BOILER MANUFACTURERS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE [1]

The American Boiler Manufacturers Association ("ABMA") is a national non-profit association representing the manufacturers of commercial, industrial and utility steam-generating and fuel-burning equipment, as well as suppliers to

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel hereby certifies that the brief submitted on behalf of amicus curiae American Boiler Manufacturers Association was not authored in whole or in part by counsel for a party, and no person or entity other than the American Boiler Manufacturers Association and its members has made a monetary contribution to the preparation of this brief.

the industry. The primary goal of ABMA is to promote the common business interests of the boiler manufacturing industry and to promote the safe, environmentally friendly use of the products and services of its members. ABMA jointly serves as a vehicle for generating support in the state and federal governments for industry concerns, while also informing the public of the vitality, environmental consciousness and high-tech orientation of the boiler industry.

SUMMARY OF ARGUMENT

The implementation of the federal Clean Air Act, coupled with the increasing efficiencies of industrial energy production, have resulted in a record of ever greater air quality in the United States. While initial gains in air quality were the result of relatively cost-effective control strategies and process changes, more recent regulation has focused on a diminishing range of costly controls. When Congress drafted the Act, they made it clear that economic and technological feasibility was to be an important part of the regulatory decision-making calculus. As society faces diminishing returns regarding its environmental regulations, it is particularly important that appropriate use of cost considerations be an overt, forthright and accurate component of the implementation of the Clean Air Act.

Amicus contends that the U.S. Environmental Protection Agency is already cognizant of its obligation to consider costs in Clean Air Act decisions, despite the anomalous ruling of *Lead Industries Ass'n. v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied* 449 U.S. 1042 (1980). First, the subjective and inaccurate mechanism of risk assessment is used, and cost and technological feasibility figure in to these calculations in inconsistent and unsatisfactory ways. It is

inconceivable that a methodologically flawed procedure such as risk assessment can filter cost and technological data, while such data cannot be utilized by the Agency directly, in the light of day. Second, Amicus observes that the ruling in *Lead Industries* has become increasingly detached from the reality of Agency action in which cost considerations are embraced in a *sub rosa* fashion. As an example, in the recent rulemaking regarding the control of nitrogen oxide, at issue in *State of Michigan v. EPA*, No. 98-1497 2000 U.S. App. LEXIS 3209 (D.C. Cir., March 3, 2000), the operative basis for regulatory action was the threshold at which such action was cost-effective. Despite the Agency histrionics involved in such an opaque use of cost considerations, the D.C. Circuit nevertheless found the underlying use of cost within the discretion of the Agency.

In short, consideration of economic and technological feasibility are an everyday reality in the implementation of the Clean Air Act. Amicus contends that this Court can restore the use of cost and technological factors to a more open environment, consistent with the plain meaning of the Clean Air Act and administrative process.

ARGUMENT

Under § 109 of the Clean Air Act ("CAA"), the Administrator of the Environmental Protection Agency must set national ambient air quality standards ("NAAQS") for ozone that "allow[] an adequate margin of safety" and are "requisite to protect public health." CAA § 109(b), 42 U.S.C. § 7409(b). The Administrator must base the NAAQS on "criteria" reflecting scientific data for public health and welfare. CAA § 108(a), 42 U.S.C. § 7408(a). At the time of setting a NAAQS for a pollutant, the Administrator must also

compile data relating to emission control technologies, installation and operation costs, energy requirements, environmental impacts and alternative methods of emissions control. CAA § 108(b)(1), 42 U.S.C. § 7408(b)(1). The statute therefore requires the Administrator to undertake a significant effort to gather a large amount and wide range of data in the NAAQS-setting process, including economic data.

Construing § 109 in *Lead Industries*, the U.S. Court of Appeals for the D.C. Circuit held that economic or technological factors may not be considered when setting a NAAQS; rather public health alone must govern the decision. *Lead Indus.*, 647 F.2d at 1149. Contrary to this holding of the D.C. Circuit, a fair reading of the law *does not* preclude consideration of the cost and feasibility of adopting one emission standard over another. This position is supported by a plain reading of the statute, other provisions of the statute, and legislative history. These points have been briefed thoroughly by Petitioners in this case, *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, modified, 195 F.3d 4 (1999), and Amicus will not elaborate on them.[2]

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[2] One purpose of the Clean Air Act relevant to Amicus perhaps left unaddressed by others briefing this case, is Congress's desire to protect "public health and welfare and the *productive capacity* of its population." CAA § 101(b)(1), 42 U.S.C. § 7410 (emphasis added). Given its plain meaning, the nation's "productive capacity" refers to the "power of" "producing goods." *Oxford Concise English Dictionary* 1092 (9th ed. 1995). Thus, the Act should be read to protect the ability of the nation to produce goods *in tandem with* the public health and welfare. Such an interpretation would be consistent with this Court's earlier acknowledgment of Congress's inherently reasonable approach to regulation: "There can be little doubt that Congress intended OSHA to balance reasonably the societal interest in health and safety with the often conflicting goal of maintaining a strong national economy. *Industrial Union Dept., AFL-CIO v. America Petroleum Inst.*, 448 U.S. 607, 669 n. 6 (1980) ("*Benzene*") (Powell, J., concurring).

Amicus will demonstrate that EPA's own actions, with respect to risk assessment and past Clean Air Act rulemakings, are inconsistent with any blanket rejection of economic consideration. Rather, EPA selectively employs the use of such data, apparently in support of preconceived outcomes. EPA's current *sub rosa* use of economic data is frankly inconsistent with the spirit and purpose of public participation in the rulemaking process as well as the Clean Air Act itself. As the *Lead Industries* court pointed out, promulgating NAAQS "presents complex questions of science, law, and social policy." *Id.* at 1146. Amicus posits that the weight of the science, law and social policy strongly favors the interpretation of § 109 that allows for reasoned consideration of economic and technological feasibility.

I. Risk Assessment, relied on by EPA to set NAAQS, is a fundamentally flawed, uncertain calculus, that must be supplied with all possible supporting documentation including factors now precluded from consideration under *Lead Industries*.

By definition, the selection of an air quality standard to protect public health is an uncertain task. As the D.C. Circuit noted in *Lead Industries*, these decisions often involve the "very frontiers of scientific knowledge" and lack consensus in the scientific community. *Lead Industries*, 647 F.2d at 1160. In an attempt to minimize the guesswork in setting environmental standards, agencies turned to risk assessment, a methodology that purported to rationalize the process. This Court endorsed this practice in *Benzene*; it now serves as the standard basis for setting environment and health standards.

Risk assessment does not eliminate uncertainty, however; it merely substitutes one type of uncertainty for another. It is fair to say that risk assessment can create more uncertainty than it resolves. How to identify a public health "risk," whether it should be diminished or eliminated, and how to achieve that goal through regulation pose virtually intractable dilemmas for Congress, agencies and courts. *See generally*, Richard B. Belzer, *The Peril and Promise of Risk Assessment*, Regulation (Fall 1991) at 40; Kevin L. Fast, *Treating Uncertainty as Risk: The Next Step in the Evolution of Environmental Regulation*, 26 ELR 10627 (December 1996). Even in the rulemaking at issue here, EPA made clear that the standard it adopted "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." 62 Fed. Reg. 38,856, 38,883 (July 18, 1997).

Thus, EPA's own process makes the point: risk assessment lacks objectivity, due to its foundation in assumptions and projections. Mark E. Shere, *The Myth of Meaningful Risk Assessment*, 19 Harvard Envtl. L Rev. 409 (1995). See also, Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Columbia L. Rev. 1613 (November 1995). When used to set environmental standards, it has "flaws in current practice, which cause exaggerated risk estimates, [that] are harmful because they cause unnecessary resource expenditures in the public and private sectors." CENTER FOR RISK ANALYSIS, HARVARD SCHOOL OF PUBLIC HEALTH, A HISTORICAL PERSPECTIVE ON RISK ASSESSMENT IN THE FEDERAL GOVERNMENT, (MARCH 1994), at 38.

The crux of Amicus's argument is that EPA has not avoided cost considerations through use of risk assessment. It has merely sublimated the logical desire for cost-beneficial

outcomes into an uncertain process likely to produce unwise and unwelcome results. Amicus believes that if the Clean Air Act is broad enough to encompass risk assessment, surely the statute contemplates more overt and methodologically sound use of cost and technological feasibility data as suggested by Petitioners.

The failure to squarely deal with the fundamental matters of cost and feasibility unjustly "wreaks havoc" on the regulated community. Productivity and continued viability of business depend on certainty. Certainty in the law is the starting point. But it also entails anticipation of what capital expenditures will be necessary two or three years down the road. The ability of U.S. firms to compete internationally is directly affected by the amount and timing of investment needed to keep up with pollution control mandates in the U.S. Rhys Jenkins, *Environmental Regulation and International Competitiveness: A review of Literature and Some European Evidence*, (United Nations University Institute for New Technologies, January 1998) at 19.

According to EPA, the average reduction of ambient concentrations of the six CAA criteria pollutants was 33% from 1987 to 1996. To achieve these reductions, stationary sources invested $9.8 billion in 1987 and $10 billion in 1989 (reported in 1996 dollars).[3] Robert W. Crandall, Frederick H. Rueter and Wilbur A. Steger, *Clearing the Air, EPA's Self-Assessment of Clean Air Policy*, 4 Regulation 35, 45 (1996) (*citing* U.S. Environmental Protection Agency, National Air Quality and Emissions Trends Report 1996).

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[3] These costs cited in the EPA Self-Assessment do not include marginal costs.

Yet, each time standards are tightened, requiring greater controls for narrower gains, sources must consider the marginal cost and technological feasibility of meeting those standards. Achieving even greater reductions "can involve limited technological choice, high cost, devotion of considerable agency resources, large legal fees, and endless argument." Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard University Press 1993) at 11. Further tightening standards through NAAQS revisions increases the need for cost consideration proportionately.

Petitioners in *American Trucking Ass'ns* attempted to distinguish *Lead Industries* from the present case by arguing that *Lead Industries* entailed *setting* an initial NAAQS, while the present case deals with *revising* an existing NAAQS. The court below could "discern no legally relevant difference" that would permit prohibiting cost consideration for setting NAAQS while allowing cost consideration for revising NAAQS. *Id.* at 1040.

Amicus agrees and further can discern no relevant policy difference. Cost and technological feasibility bear on standard setting and revision. However, it is also true that greater reduction requirements compel greater scrutiny of the ability of industry to meet the standards and remain viable. This Court has not historically been blind to such practical realities. In *Benzene,* this Court assessed whether under the Occupational Safety and Health Act an agency could mandate a near zero-tolerance level of benzene in the workplace. A plurality of the Court rejected that outcome, viewing as "unreasonable" an assumption "that Congress intended to give the secretary the unprecedented power over American industry that would result" from that approach. 448 US 607, 645 (U.S.

1980). The plurality of the Court went on to prevent that outcome by reading the limitation "significant risk" into the provision being construed. *Id.*

Of course, in *Benzene* the Court was construing a statute that expressly included a reasonableness standard for setting exposure limits. The Clean Air Act provision before the Court today has no similar express limitation. It strains credulity nonetheless to believe that the universal guidepost of reasonableness does not apply with equal force in the present case.

> "It may be true. . . that the Act as a whole expresses a distinct preference for safety over dollars. But that expression of preference, as I read it, falls far short of the proposition that the Secretary must eliminate marginal or insignificant risks of material harm right down to an industry's breaking point."

Benzene, 448 U.S. at 683 (Rehnquist, concurring).

In essence, risk assessment is a filter through which economic and technological constraints are viewed. It is inconceivable that the Clean Air Act allows for the filter (with all its methodological shortcomings) but makes illegal the consideration of such constraints in a direct and forthright manner.[4]

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[4] Such a result is inconsistent even with EPA's own intentions. *See also*, Sheldon Meyers, *Applications of De Minimis* IN DE MINIMIS RISK 103 (CHRIS WHIPPLE, ED., 1987) (authored by an EPA official, describing economic forces as compelling cost/benefit consideration, explaining that EPA practice includes feasibility and cost consideration in

II. Continued Adherence to *Lead Industries* Ignores the Reality that the Agency Does Consider Costs and Will Lead to *Sub Rosa* Consideration of Costs in Future Rulemakings

In addition to the impacts on the regulated community of continued adherence to *Lead Industries*, it is clear that cost is currently a factor in NAAQS decision-making as a matter of practical and political necessity.[5] Only recently, the D.C. Circuit addressed the issue of NAAQS cost assessment in *State of Michigan v. EPA*, 2000 U.S. App. LEXIS 3209, at *24-*39. This case arose as a challenge to an EPA rule setting statewide emissions limits for nitrogen oxide ("NOx"), to be implemented through NOx limits on stationary sources in state implementation plans ("NOx SIP Rule").[6]

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setting de minimis risk, and suggesting that such agency deliberations should be conducted "in full public view.")

[5] As one commentator has observed, "[i]gnoring the cost implications of the environmental policy has become politically infeasible given the drive for reduced government." March Sadowitz, *Tailoring Cost-Benefit Analysis to Environmental Policy Goals: Technology-Health-Based Environmental Standards in the Age of Cost-Benefit Analysis*, 2 B.U.J. Sci. & Tech. L. 11 (1996) (page references not available).

[6] The NOx SIP rule is closely related to the *ozone* rule being considered here. Ozone is formed by the chemical and physical reaction of NOx and volatile organic compounds ("VOCs"). Therefore, EPA's rule to reduce NOx emissions is a means to reduce ambient *ozone* concentrations. *See, generally*, Finding of Significant Contribution and Rulemaking for certain states in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (EPA final rule to require states to prohibit specific amounts of NOx emissions).

In the NOx SIP Rule, EPA did not on the face of the rulemaking, include in its calculus the cost/benefit analysis of the standard it adopted. Rather, it buried the cost/benefit consideration in a threshold determination of what would be an acceptable level of control. *See, generally*, 63 Fed. Reg. 57356, 57376 (Oct. 27, 1998). There, EPA construed § 110 of the CAA, to determine to what extent some upwind states contribute NOx emissions to other states, causing those downwind states to be in violation of the NAAQS for ozone. EPA did not define what level of NOx emissions contributed to other states that it would consider unacceptable and constitute a CAA violation. Rather, EPA spent months (effectively years) gathering data about NOx emissions from various sources and the cost to each source type to reduce those emissions to a range of levels. Based on that data, EPA calculated the *average* cost per source type to reduce emissions to a range of levels. Then EPA chose an average cost of $2,000 a ton that it determined to be "cost-effective". The level of emissions reductions achievable at that average cost became - de facto - the maximum level of NOx that a source could emit without violating the CAA. Thus, EPA used this byzantine construct, built on a cost analysis, to define what interstate ozone-forming NOx emissions are allowable under the NAAQS.

As the D.C. Circuit observed in *Michigan v. EPA*, "the ultimate line of 'significance,' [for purposes of determining a 'significant contributor' under 42 U.S.C. § 7410(a)(2)(D)(i)(I)] whether measured in the volume of NOx emitted or arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs." *Michigan*, 2000 U.S. App LEXIS 3209, at *26. The ultimate effect of this use of cost by the Agency was, as the D.C. Circuit explained, "that, after reduction of all that could be cost-effectively eliminated, any

remaining 'contribution' would not be considered 'significant'..." *Id.* at *33. In recognizing that cost was necessarily integral to the Agency's decision-making, the D.C. Circuit rejected challenges to the Agency's consideration of costs. The Court reasoned:

> Petitioners conspicuously fail to describe the intellectual process by which EPA would determine "significance" if it may consider only health. EPA has determined that ozone has some adverse health effects - however slight - at every level. Without consideration of cost it is hard to see why any ozone-creating emissions should not be regarded as fatally "significant" under § 110(a)(2)(D)(i)(I).

Id. at *35 (citation omitted).

The Court bolstered this conclusion by reference to other precedents in which it had construed similar language to permit consideration of cost, and commented that "[t]hese cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction." *Id.* at *38. The commonality among these cases as described by the D.C. Circuit was "[a] mandate directed to some environmental benefit [that] is phrased in general quantitative terms ('ample margin of safety,' 'substantial restoration,' and 'major'), and contains not a word alluding to non-health tradeoffs; in each case we found that in making judgments of degree the agency was free to consider the costs of demanding higher levels of environmental benefit." *Id.* at *39. Implicit in the interpretive principle extracted by the Court that costs may be considered unless expressly precluded is the recognition that costs are integral to environmental

policymaking *as a practical matter*, and that the courts will not therefore lightly interpret a statute to reflect congressional intent to preclude consideration of costs.

The point here can be simply stated: costs and benefits *must* eventually be considered in setting air quality standards. The NOx SIP Rule demonstrates that EPA *does now* consider costs and benefits. The present NAAQS as interpreted by the DC Circuit in *Lead Industries disallows* cost consideration at the early stage of setting the standards. This opens the door for even broader discretion by the Agency, which must eventually confront the cost/benefit issue, to find another point in the regulatory process to consider costs. In the NOx Rule, *that* point was transferred to the point of defining the maximum amount of NOx a source type in one state can emit into another state without violating the CAA. Cost/benefit analysis in *Michigan* clearly drove the "health" decision for allowable levels of ozone emissions that may be transported state-to-state. That approach was fully embraced by the DC Circuit in *Michigan v. EPA*.

A similar result can be seen in the D.C. Circuit's decision in *Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987). In *NRDC*, the D.C. Circuit was construing § 112 of the Act, 42 U.S.C. § 7412, which provides in relevant part that the Agency must set the emissions standard under § 112 "at the level which in his judgment provides an ample margin of safety to protect the public health." In *NRDC*, the EPA stated its interpretation of its duty under § 112 as "requir[ing] emissions reductions to the lowest level achievable by use of the best available control technology in cases involving non-threshold pollutants, where complete emission prohibition would result in widespread industry closure and EPA has determined that the cost of such

closure would be grossly disproportionate to the benefits of removing the risk..." *Id.* at 1148 (*quoting* 52 Fed. Reg. 59,532, 59,534 (1975)). The Court held that EPA's determination of what is "safe" must be based solely on health risks, but that cost and technological feasibility could be considered later in determining what constitutes an "ample margin" of safety. *Id.* at 1165. The "two-step" analysis performed by the Court in *NRDC* again reflects the reality that where cost considerations are precluded at one level of the rulemaking process, they will appear at another stage of the regulatory process.

Therefore, to say that cost/benefit considerations are disallowed when setting NAAQS is to ignore the realities of CAA implementation. In the case of ozone, even if cost were not considered when revising the ozone NAAQS as a threshold matter, cost played a pivotal role later when EPA set acceptable levels of NOx emissions that are allegedly transported into other states. While the ozone NAAQS and the ozone transport questions in the NOx SIP rule may appear unrelated, they are actually closely related. The NAAQS Rule under consideration in the present case identifies an ozone emission limit for source types, beyond which point emissions violate the NAAQS. The NOx SIP Rule identifies an ozone emission limit for source types statewide, beyond which point emissions are presumed to be transported and "contribute significantly" to other states' violation of NAAQS. CAA § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D); *see generally*, *Michigan v. EPA*, *supra*. Taken to their practical ends, whether promulgated under § 108 or § 110(a)(2)(D), each ozone rule establishes an emissions limit that requires stationary sources to change operations or retrofit facilities with control equipment to meet the new standards. Costs are incurred, either way.

Delaying cost evaluation in this fashion results in an overly broad grant of discretion to the agency. First, the agency selects the point at which costs are considered, which allows the Agency to "game" the system. The Agency can choose points on the economic curve to suit its purpose, irrespective of actual impacts. Second, the Agency may transmute cost into something other than it is, dealing with it inconspicuously. In NOx SIP rule, EPA buried cost beneath a complex construct, with a defined level of alleged interstate emissions serving as the pretext for requiring cost-driven emission reductions. The D.C. Circuit upheld EPA's use of "cost-effective reductions" to define "significant contribution." Amicus does not challenge that finding here, but merely highlights the fact that costs were the fulcrum for identifying the allowable statewide ozone-forming NOx emissions level in that case.

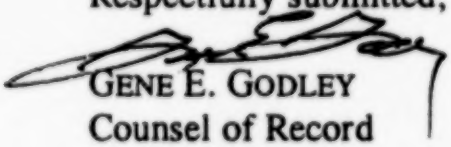
The regulatory cost of NAAQS must be -- and is -- eventually confronted. As demonstrated in *NOx SIP*, cost consideration may be deferred for a later regulatory moment and obscured in a fashion that does not shine a spotlight on cost as a factor in a health-based standard.

EPA has reluctantly come to learn what the regulated community has always known: cost and technological feasibility are factors in determining what level of regulatory control can reasonably be demanded by society. Amicus believes the Clean Air Act is better interpreted if this consideration of those factors occurs in an open and honest environment, and not when held hostage to inscrutable risk assessment or regulatory hijinks.

CONCLUSION

For all the foregoing reasons, this Court should reverse the lower court judgment that NAAQS revisions under § 109 of the CAA must be made without consideration of costs and other impacts.

Respectfully submitted,



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No. 99-1426

IN THE

SUPREME COURT OF THE UNITED STATES

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Cross-Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, KENNETH J. ARROW, ELIZABETH E. BAILEY, WILLIAM J. BAUMOL, JAGDISH BHAGWATI, MICHAEL J. BOSKIN, DAVID F. BRADFORD, ROBERT W. CRANDALL, MAUREEN L. CROPPER, CHISTOPHER C. DEMUTH, GEORGE C. EADS, MILTON FRIEDMAN, JOHN D. GRAHAM, WENDY L. GRAMM, ROBERT W. HAHN, PAUL L. JOSKOW, ALFRED E. KAHN, PAUL R. KRUGMAN, LESTER B. LAVE, ROBERT E. LITAN, RANDALL W. LUTTER, PAUL W. MACAVOY, PAUL W. MCCRACKEN, JAMES C. MILLER III, WILLIAM A. NISKANEN, WILLIAM D. NORDHAUS, WALLACE E. OATES, PETER PASSELL, SAM PELTZMAN, PAUL R. PORTNEY, ALICE M. RIVLIN, MILTON RUSSELL, RICHARD L. SCHMALENSEE, CHARLES L. SCHULTZE, V. KERRY SMITH, ROBERT M. SOLOW, ROBERT N. STAVINS, JOSEPH E. STIGLITZ, LAURA D'ANDREA TYSON, W. KIP VISCUSI, MURRAY L. WEIDENBAUM, JANET L. YELLEN, AND RICHARD J. ZECKHAUSER IN SUPPORT OF CROSS-PETITIONERS

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ARGUMENT 7

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INTEREST OF *AMICI CURIAE*

This brief is being submitted on behalf of a group of economists.[1] The purpose of the brief is not to attempt to guide the Court on legal issues but to inform it on economic ones. To put ourselves in the best possible position to offer the Court our expertise, we have tried to understand, in light of the legal task confronting the Court, where our own economic expertise might have a useful role to play.

To that end, we understand that the lawyers who brought this case framed the following question for the Court's consideration: "Whether the Clean Air Act requires that the Environmental Protection Agency ignore all factors 'other than health effects relating to pollutants in the air'" when setting National Ambient Air Quality Standards (NAAQS). We also understand that this question has arisen in part because the United States Court of Appeals in Washington, D.C., whose responsibility it is to review air quality standards issued by the Environmental Protection Agency (EPA), has interpreted the Clean Air Act as barring the EPA from even considering the potential costs of its air quality regulations.

The merits of this legal debate between the D.C. Circuit and the counsel who have contested the D.C. Circuit's views are beyond the scope of our economic expertise and hence of this brief. Nonetheless, we respectfully offer the following observations with hopes that they may ultimately prove useful.

The importance of this issue cannot be overstated. Both the direct benefits and costs of environmental, health, and safety regulations are substantial–estimated to be several hundred

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[1] No counsel for any party to this case authored this brief in whole or in part; and no person other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

billion dollars annually. If these resources were better allocated with the objective of reducing human health risk, scholars have predicted that tens of thousands more lives could be saved each year.[2] All presidents since Nixon–both Democratic and Republican–have attempted to make environmental, health, and safety regulations more efficient by requiring some form of oversight attempting to balance benefits and costs. President Reagan and President Clinton each crafted an executive order that required an explicit balancing of benefits and costs for major regulations to the extent permitted by law. A comprehensive regulatory impact analysis (RIA) prepared in conformance with President Clinton's Executive Order 12866 was done for the ozone and particulate matter rulemaking, but it played no official or overt part in the decision in this case because of the D.C. Circuit's view that costs must not be considered.

The issue presented in this case is of great significance to *amici curiae*. In 1998, the American Enterprise Institute (AEI) and the Brookings Institution established the AEI-Brookings Joint Center for Regulatory Studies (Joint Center) to help improve regulation and the regulatory process. A principal focus of the Joint Center is to analyze the economic benefits and costs of regulations, such as the ones being considered here, and to explore the implications of court decisions involving regulation. The Joint Center and the economists submitting this brief have a substantial interest in seeing that the Court

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[2] *See* Tammy O. Tengs and John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving, in* RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION (Robert W. Hahn ed. 1996). (The authors, from the Harvard School of Public Health, calculated that improved priority setting across federal agencies could provide either savings of $31.1 billion from current cost levels with no additional loss of life or savings of 60,200 lives at current cost levels.)

interprets the Clean Air Act in a manner that encourages sound decisions and in a way that is consistent with the law as established by Congress.

To that end the Joint Center asked the economists who are signatories to this brief to identify principles that are appropriate for setting National Ambient Air Quality Standards as well as for making other important regulatory decisions. The Joint Center and these economists are accordingly submitting this brief in the interest of improving regulatory decisionmaking as well as making it more transparent. All parties have consented to the filing of this brief.

BACKGROUND

A. Procedural History

In 1996, the EPA initiated rulemakings to revise the National Ambient Air Quality Standards for ozone and particulate matter (PM). The EPA prepared an RIA that suggested that the costs of the ozone standards would exceed the benefits while the benefits of the particulate matter standards would exceed the costs. The Joint Center strongly favors using such RIAs in decisionmaking and, without endorsing the quality of all aspects of the RIA here, believes that the ozone and PM RIA should have been considered in setting the standards. The D.C. Circuit ruled, however, that *Lead Industries* barred any consideration of costs and hence was unwilling to consider whether a balancing of benefits and costs might provide the requisite "intelligible principle" needed to resolve the constitutional problems that it found with EPA's interpretation of the statute.[3]

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[3] *See Lead Indus. Ass'n v. EPA*, 499 U.S. 1042 (D.C. Cir. 1980).

B. Nature and Importance of Benefit-Cost Analysis

The concern of the Joint Center along with that of the other signatories is how analytical methods, such as benefit-cost analysis, should be used in regulatory decisionmaking.[4] These methods can help promote the design of better regulations by providing a sensible framework for comparing the alternatives involved in any regulatory choice. Such analysis improves the chances that regulations will be designed to achieve a particular social goal specified by legislators at a lower cost.[5] In addition, they can make the regulatory process more transparent by providing an analytical basis for a decision. Greater transparency in the process, in turn, will help hold regulators and lawmakers more accountable for their decisions.

These analytical methods are neither anti- nor proregulation; they can suggest reasons why it would be desirable to have tighter or more lenient standards depending on the results of an analysis. For example, the benefit-cost analyses in the RIA on particulate matter and ozone could be interpreted as suggesting that the ozone standard should not be lowered while a new PM standard for fine particles should be introduced to protect public health.

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[4] *See* KENNETH J. ARROW, MAUREEN L. CROPPER, GEORGE C. EADS, ROBERT W. HAHN, LESTER B. LAVE, ROGER G. NOLL, PAUL R. PORTNEY, MILTON RUSSELL, RICHARD L. SCHMALENSEE, V. KERRY SMITH, AND ROBERT N. STAVINS, BENEFIT-COST ANALYSIS IN ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION: A STATEMENT OF PRINCIPLES (1996) ("ARROW *et al.*"); *see also* ROBERT W. CRANDALL, CHRISTOPHER DEMUTH, ROBERT W. HAHN, ROBERT E. LITAN, PIETRO S. NIVOLA, AND PAUL R. PORTNEY, AN AGENDA FOR FEDERAL REGULATORY REFORM (1997).

[5] *See* ARROW *et al.*

C. Evolution of the Use of Benefit-Cost Analysis in Regulatory Decisionmaking

Over the past two decades, support has been growing for the proposition that weighing of benefits and costs should play a more central role in regulatory decisionmaking. All three branches of government have recognized the importance of considering benefits and costs in designing regulation.[6]

To address the increase in regulatory activity over the past three decades, the past five presidents and President Clinton have introduced different analytical requirements and oversight mechanisms with varying degrees of success. A central component of later oversight mechanisms was formal economic analysis, which included benefit-cost analysis and cost-effectiveness analysis. Since 1981, presidents have required the preparation of RIAs for a predefined class of significant regulations.[7] President Reagan's Executive Order 12291 required an RIA for each significant regulation whose annual impact on the economy was estimated to exceed $100 million. President Bush used the same executive order. President Clinton's and President Reagan's executive orders require a benefit-cost analysis for significant regulations as well as an

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[6] *See, e.g.*, Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 8–11 (1995).

[7] While the definition of a "significant" regulation has changed somewhat over time, it is generally a regulation that is expected to have one or more of the following characteristics: an annual impact on the economy of $100 million or more; a major increase in costs or prices for consumers or business; or significant effects on competition, employment, investment, productivity, or innovation. President Reagan's Executive Order 12291 described such regulations as "major," while President Clinton's Executive Order 12866 described them as "significant." We will use the term *significant* because it is used by the most recent executive order.

assessment of reasonably feasible alternatives to the planned regulation.[8]

Congress has also shown increasing interest in emphasizing the balancing of benefits and costs in regulatory decisions. The Small Business Regulatory Enforcement Fairness Act of 1996 requires agencies to submit final regulations to Congress for review.[9] The regulatory accountability provisions of 1996, 1997, and 1998 require the Office of Management and Budget to assess the benefits and costs of existing federal regulatory programs and to recommend programs or specific regulations to reform or eliminate. The Unfunded Mandates Reform Act of 1995 requires agencies, unless prohibited by law, to choose the most cost-effective regulatory approach or otherwise explain why they have not chosen this alternative.[10]

The courts have also been receptive to the use of benefit-cost analysis in decisionmaking. Indeed, the D.C. Circuit recently held in *State of Michigan v. EPA*, 2000 WL 180650, at *12 (D.C. Cir. 2000), that "[i]t is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." The court went on to cite various cases and legal authorities for the "general view

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[8] The language in those two executive orders is very similar, suggesting bipartisan presidential support for benefit-cost analysis. *See* Executive Order 12291, 46 FED. REG. 13,193 (Feb. 17, 1981). "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society. . . . Regulatory objectives shall be chosen to maximize the net benefits to society." *Id.* at § 2. *See also* Executive Order 12866, 58 FED. REG. 51,735 (Oct. 4, 1993). "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives. . . . Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits . . ., unless a statute requires another approach." *Id.* at § 1.

[9] 15 U. S. C. § 601 *et seq.*

[10] 2 U. S. C. § 1535.

that preclusion of cost consideration requires a rather specific congressional direction." *Id.* This case and others led Professors Robert H. Frank and Cass R. Sunstein to conclude that "[f]ederal law now reflects a kind of default principle: Agencies will consider costs, and thus undertake cost-benefit analysis, if Congress has not unambiguously said that they cannot."[11]

SUMMARY OF ARGUMENT

As we understand it, the D.C. Circuit did not allow the EPA to consider the costs of complying with ozone and PM NAAQS. As we further understand it, this legal ruling can be overturned only by this Court. As economists, we believe that the D.C. Circuit's ruling not allowing the EPA to consider important information relating to the consequences of its regulatory actions is economically unsound. Without delving into the legal aspects of the case, we present below why we think the Court should allow the EPA to consider costs in setting standards. In particular, we believe that, as a general principle, regulators should be allowed to consider explicitly the full consequences of their regulatory decisions. These consequences include the regulation's benefits, costs, and any other relevant factors.

ARGUMENT

We approach the question presented in this case from the perspective of the "default principle" summarized by Professors Frank and Sunstein.

Nothing in the following statutory text of section 109(b) of the Clean Air Act precludes consideration of costs:

> National primary ambient air quality standards . . . shall be ambient air quality standards the

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[11] ROBERT H. FRANK AND CASS R. SUNSTEIN, COST-BENEFIT ANALYSIS AND RELATIVE POSITION, (AEI-Brookings Joint Center for Regulatory Studies Working Paper 00-5, 2000), at 8.

> attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing a margin of safety, are requisite to protect the public health.[12]

Indeed, the plain aim of this provision is protecting the "public health," and that aim is unlikely to be achieved without, at least, an implicit balancing of benefits and costs.

Benefit-cost analysis is simply a tool that can aid in making decisions. Most people do a kind of informal benefit-cost analysis when considering the personal pros and cons of their actions in everyday life–more for big decisions, like choosing a college or job or house, than for little ones, like driving to the grocery store. Where decisions, such as federal environmental regulations, are by their nature public rather than private, the government, as a faithful agent of its citizens, should do something similar.

Carefully considering the social benefits and social costs of a course of action makes good sense. Economists and other students of government policy have developed ways of making those comparisons systematic. Those techniques fall under the label benefit-cost analysis. Benefit-cost analysis does not provide *the* policy answer, but rather defines a useful framework for debate, either by a legislature or, where the legislature has delegated to a specialized agency the responsibility of pursuing a general good, by that agency.

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[12] 42 U.S.C. § 7409(b)(1).

I. A GROUP OF ECONOMISTS DEVELOPS A CONSENSUS ON THE USE OF BENEFIT-COST ANALYSIS FOR ENVIRONMENTAL REGULATION.

Economists, other policy experts, and the regulatory agencies themselves have produced a large literature on the methods and applications of benefit-cost analysis. There are, and always will be, many uncertainties and disagreements about those methods and their application in particular cases. Nevertheless, a wide consensus exists on certain fundamental matters. In 1996, a group of distinguished economists, including Nobel laureate Kenneth Arrow, were assembled to develop principles for benefit-cost analysis in environmental, health, and safety regulation.[13] Here, we summarize and paraphrase for the Court a number of principles that we think could be helpful in this case, which involves the review of the EPA's NAAQS standard-setting decisions.

A benefit-cost analysis is a useful way of organizing a comparison of the favorable and unfavorable effects of proposed policies. Benefit-cost analysis can help the decisionmaker better understand the implications of a decision. It should be used to inform decisionmakers. Benefit-cost analysis can provide useful estimates of the overall benefits and costs of proposed policies. It can also assess the impacts of proposed policies on consumers, workers, and owners of firms and can identify potential winners and losers.

In many cases, benefit-cost analysis cannot be used to prove that the economic benefits of a decision will exceed or fall short of the costs. Yet benefit-cost analysis should play an important role in informing the decisionmaking process, even when the information on benefits, costs, or both is highly uncertain, as is often the case with regulations involving the

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[13] *See* ARROW *et al.*

environment, health, and safety.

Economic analysis can be useful in designing regulatory strategies that achieve a desired goal at the lowest possible cost. Too frequently, environmental, health, and safety regulation has used a one-size-fits-all or command-and-control approach. Economic analysis can highlight the extent to which cost savings can be achieved by using alternative, more flexible approaches that reward performance.

Benefit-cost analysis should be required for all major regulatory decisions. The scale of a benefit-cost analysis should depend on both the stakes involved and the likelihood that the resulting information will affect the ultimate decision.

Agencies should not be bound by a strict benefit-cost test, but should be required to consider available benefit-cost analyses. There may be factors other than economic benefits and costs that agencies will want to weigh in decisions, such as equity within and across generations.

Not all impacts of a decision can be quantified or expressed in dollar terms. Care should be taken to ensure that quantitative factors do not dominate important qualitative factors in decisionmaking. A common critique of benefit-cost analysis is that it does not emphasize factors that are not easily quantified or monetized. That critique has merit. There are two principal ways to address it: first, quantify as many factors as are reasonable and quantify or characterize the relevant uncertainties; and second, give due consideration to factors that defy quantification but are thought to be important.

II. IF AT ALL POSSIBLE GIVEN THE RELEVANT LEGAL AUTHORITIES, THE COURT SHOULD HOLD THAT SECTION 109(B) ALLOWS CONSIDERATION OF BOTH BENEFITS AND COSTS WHEN SETTING NAAQS.

We believe all of the available information should be considered in making any important decision. If costs or other types of data are deliberately left out, the quality of decisionmaking is likely to suffer. In particular, we make one recommendation, closely related to the Arrow *et al.* principles: The Court should allow the EPA to consider costs in setting NAAQS, so that these costs can then be assessed along with benefits and any other important information.

We believe that it would be imprudent for the EPA to ignore costs totally, particularly given their magnitude in this case. Together, the EPA estimates that those standards could cost on the order of $50 billion annually. Not considering costs makes it difficult to set a defensible standard, especially when there is no threshold level below which health risks disappear. The EPA acknowledges that exposure to ozone presents a "continuum" of risk, as opposed to a threshold below which adverse health effects cease to occur.[14] If the EPA is required to set a standard "to protect the public health" with an "adequate margin of safety," then ignoring costs could lead to a decision to set the standard at zero pollution.[15] That alternative, however, would be self-defeating–it would harm public health by threatening the very economic prosperity on which public health primarily depends.

Once the Court allows the EPA to consider costs, Executive Order 12866 will require the EPA to consider the full range of benefits and costs in setting NAAQS. We think that

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[14] 62 FED. REG. 38,856, 38,863 (July 18, 1997).

[15] Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1).

considering such information could improve both the regulatory decisionmaking process by making it more transparent and the regulatory decision by allowing all relevant information to be considered explicitly.

CONCLUSION

We believe that this Supreme Court case involving the setting of National Ambient Air Quality Standards could be a historic moment in the making of regulatory policy. This brief has argued that it would be imprudent not to consider costs in the setting of standards. In accordance with Executive Order 12866, we also believe that the full range of benefits and costs should be considered in decisionmaking. Accordingly, this Court should allow the Environmental Protection Agency to consider costs in setting nationwide air quality standards, so that this information can be considered along with benefits and any other relevant factors in setting a standard.

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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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4108

QUESTION PRESENTED

Whether the EPA Administrator is permitted, in setting a National Ambient Air Quality Standard ("NAAQS") under Section 109 of the Clean Air Act, to exercise her judgment by taking account of considerations such as the cost-effectiveness and net benefits of alternative risk levels that would protect the public health?

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INTEREST OF *AMICI CURIAE* [1]

Amicus Orrin Hatch is a Member of the United States Senate from Utah, and *amicus* Tom Bliley is a Member of the United States House of Representatives from Virginia. *Amici* are both concerned that the Environmental Protection Agency's ("EPA") implementation of the Act is contrary to congressional will and frustrates effective congressional and judicial oversight. Because EPA has been hamstrung by an erroneous judicial precedent that irrationally prevents the agency from considering the cost effectiveness of its regulations, EPA engages in a science charade wherein policy and economic judgments are masked as scientific determinations, and makes unreviewable regulatory determinations that undermine the statutory scheme.

INTRODUCTION

Section 109 of the Clean Air Act, 42 U.S.C. § 7409, unquestionably gives EPA a far-reaching mandate to protect the public health from dangerous air pollutants. The only issue in this case is whether the Act imposes a regime of regulatory irrationality and profligacy on the states and the American public, and forbids the EPA Administrator to apply the full range of her expert judgment to determine what standards are requisite to protect the public health. The Act does give the Administrator that discretion, despite the contrary decision of the Court of Appeals for the District of Columbia Circuit in *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980). That misguided precedent held that the Administrator was precluded from considering the cost-effectiveness or net benefits of a particular NAAQS in

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for any party authored this brief in whole or in part, and that Citizens for a Sound Economy has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Office of the Clerk of this Court. *See* Sup. Ct. R. 37.3.

exercising judgment to protect the public health, and instead must set NAAQS solely on the basis of the health effects of the pollutant itself. *Id.* at 1147-55.[2]

Applying the *Lead Industries* rule, in 1997, EPA issued a new and more stringent primary NAAQS level for ozone that would entail an incremental cost of up to $9.6 billion annually to attain, even though EPA valued the expected benefits of attainment at only $1.5 to $8.5 billion.[3] Yet, scientific evidence of dangers to public health from ozone did not drive this hugely consequential regulatory decision. After reviewing the available data and various alternative NAAQS (including maintaining the existing standard), the Clean Air Scientific Advisory Committee ("CASAC") advised EPA that "there is no 'bright line'" distinguishing any of the alternatives as "significantly more protective of public health."[4]

EPA's rulemaking for particulate matter ("PM") was equally dubious. EPA for the first time established a NAAQS for the finer fractions of PM (particles with a diameter of 2.5 microns and less, referred to as $PM_{2.5}$). EPA took that step despite its

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[2] EPA has endorsed *Lead Industries* as reflecting its view of section 109, but also regards it as binding precedent from which it has no discretion to depart. National Ambient Air Quality Standards for Particulate Matter; Final Rule, 62 Fed. Reg. 38,651, 38,683-89 (1997) ("*PM Rule*"); National Ambient Air Quality Standards for Ozone; Final Rule, 62 Fed. Reg. 38,855, 38,878-83 (1997) ("*Ozone Rule*"). The court below likewise regarded *Lead Industries* as binding. Pet. App. 15a.

[3] Innovative Strategies and Econs. Group, *Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12, ES-17 (1997) ("*Final RIA*"). Given *Lead Industries*, EPA considers itself legally precluded from using this analysis in setting NAAQS. *Id.* at ES-3.

[4] Letter from George Wolff, Chair, CASAC, to Carol Browner, Administrator, EPA, 3 (Nov. 30, 1995) (regarding CASAC closure on the primary standard portion of the staff paper for ozone).

acknowledgement of the "significant uncertainties" surrounding the health effects of PM,[5] *PM Rule*, 62 Fed. Reg. at 38,655, and despite Congress's funding of a large new research program to resolve scientific uncertainty about $PM_{2.5}$,[6] accompanied by an admonition to EPA characterizing promulgation of new PM standards as "premature." H.R. Conf. Rep. No. 104-812, at 70 (1996). EPA predicts (conservatively) that the annual national incremental cost of *partial* attainment with the new PM standard will be $8.6 billion, with full attainment by the year 2010 reaching $37 billion annually. *Final RIA* at ES-12 to ES-13.

SUMMARY OF THE ARGUMENT

If *Lead Industries* were correct, section 109 of the Act would be the odd statutory mandate that precludes the balancing of economic considerations and weighing of relative harms necessary to produce regulation in the public interest. The text and history of section 109 make clear that Congress did not in 1970 mandate such an extreme departure from basic tenets of sound risk management. Rather, the broad textual authority for the Administrator to set national standards for pollutants "that rea-

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[5] EPA staff, the National Research Council, the Congress, and the President have all emphasized the "unusually large uncertainties" that make promulgation of a $PM_{2.5}$ standard problematic. Office of Air Quality Planning and Standards, EPA, *Review of the National Ambient Air Quality Standards for Particulate Matter, Policy Assessment of Scientific and Technical Information* VII-41 (1996); Board on Env'tl Studies & Toxicology, National Research Council, *Research Priorities for Airborne Particular Matter: I. Immediate Priorities and a Long-Range Research Portfolio* 1, 2 (1998); H.R. Conf. Rep. No. 104-812, at 70 (1996) (noting, prior to rulemaking, that there were "insufficient data available for the Agency to decide what changes, if any, should be made to the current standard"); *Budget of the United States Government: Fiscal Year 1998*, at 81 (1997) (President requests research funds to "reduce the great uncertainty about PM's health effects").

[6] Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, Pub. L. No. 104-204, tit. III 110 Stat. 2874, 2909-10 (1996).

sonably may be anticipated to endanger public health and welfare," to exercise her "judgment" in setting standards "requisite to protect the public health," to determine what margins of safety are "adequate," to modify such standards after public comment as she deems "appropriate," all suggest that the Administrator is to apply her full expertise (in health sciences, environmental technology, and the socioeconomic effects of pollution and its control) in selecting from among alternative health-protective standards. There is simply no basis in the statute for EPA's false dichotomy between the setting of standards, which EPA claims must be free of any economic influence, and the implementation phase, which EPA claims is the unique moment when economic factors may be considered. The text and legislative history confirm that, in the absence of a determinate scientific answer as to when the public health is clearly endangered, Congress intended for the Administrator to consider the same factors in setting public health standards as the states did under the Air Quality Act of 1967.

Economic considerations such as cost-effectiveness are fundamental, non-controversial elements of risk management that Congress, the Administration, and in analogous contexts, EPA, have all embraced. Nothing in section 109 precludes consideration of these factors by the Administrator in setting NAAQS. Contrary to EPA's claims that Congress has by acquiescence ratified *Lead Industries*, subsequent legislation in the 1990s, including amendments to the Act itself, suggest that section 109 must be interpreted to favor the promulgation of cost-effective regulation.

Most fundamentally, adherence to *Lead Industries* has turned the NAAQS process into a charade. EPA does consider costs and balance harms when it sets a NAAQS, albeit covertly. It simply masks such judgments as scientific decisions, thus frustrating judicial, congressional, and public oversight. See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1617 (1995). Moreover, despite the clear

purpose of the Act to achieve attainment of national standards, EPA has effectively abandoned any attempt to do so. Having set untenable standards under the *Lead Industries* approach, EPA has devised—without statutory authorization, without explication of its reasons or evidence, and without effective judicial or congressional review—arbitrary cost caps on source compliance that will subvert attainment. The will of Congress is undone, and EPA has effectively drawn its own charter. This Court should overrule *Lead Industries* to revive the rational scheme Congress devised, and to permit the EPA to consider all factors relevant to the proper level of NAAQS when science does not provide a clear answer.

ARGUMENT

I. THE CLEAN AIR ACT DOES NOT PRECLUDE EPA'S CONSIDERATION OF ECONOMIC AND NON-HEALTH FACTORS IN SETTING AIR QUALITY STANDARDS.

The Clean Air Act, and its history, evince Congress's intention to authorize extraordinary measures to safeguard the public health from the dangers of air pollution. They do not support the conclusion that section 109 is like the well-known "Delaney Clause,"[7] a categorical ban of carcinogenic additives that prohibited the exercise of any policy judgment.

To be sure, this Court rightly characterized the original Act as " 'technology-forcing' " and "expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257 (1976) (quoting *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 91 (1975)); see also S. Rep. No. 91-1196, at 2-3 (1970);

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[7] *See* 21 U.S.C. § 348(c)(3)(A) ("no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal").

H.R. Rep. No. 101-490, Pt. 1, at 145 (1990). But, with scant textual analysis and misplaced reliance on legislative history, *Lead Industries* leapt from the incontrovertible proposition that Congress placed no feasibility constraints on the EPA's ability to protect the public health to a far more radical and unsupported conclusion: namely, that the Act banishes *any* consideration of economic consequences from EPA's weighing of the appropriate risk levels, in the face of scientific uncertainty, that would protect the public health with an "adequate" margin of safety. 647 F.2d at 1148-56. A "survey of the totality of the statutory scheme" of the Clean Air Act, *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978), manifests the error of *Lead Industries*.

A. *Lead Industries* Irrationally Excluded Economic Considerations From NAAQS Standard-Setting.

This Court's task is to "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole," leavening its interpretation with "common sense as to the manner in which Congress is likely to delegate a policy decision of … economic and political magnitude to an administrative agency." *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000) (internal quotation marks and citations omitted). Cost-effectiveness is a matter of common sense, and nothing in the text of the Act—or for that matter its history, structure, or purposes—ordains the result of *Lead Industries* and prohibits EPA from protecting the public health in a cost effective manner.

While public health trumps private costs under the Clean Air Act, "public health" is, like nearly everything else in regulatory life, relative. It turns on the statistical incidence of various health hazards spread out over disparate sub-populations comprised of differentially exposed, susceptible, and sensitive individuals with varying degrees of acute, chronic, and reversible disease or discomfort. Under some circumstances, the available

data will be so clear-cut, and the risk breakpoints so bright, that "protect[ing] the public health" with "an adequate margin of safety" reduces to an exercise in pure science. That is not the case for the NAAQS in question. For ozone, as noted above, EPA's own scientific advisers reported the absence of a "bright line." For particulate matter, the risks are greater, but are so rife with the uncertainty acknowledged by EPA, the President, and Congress that they may have no impact on public health at all.

Overruling *Lead Industries* would thus not displace the "public health" mandate. It would preserve that mandate by maintaining EPA's authority to abate any significant health risks, while obligating EPA to consider and disclose the point on the continuum of relative protection where it believes the public health is best served. Cost-effective environmental protection is not a matter of saving business or government money; it is a *public* health benefit to spend the amount of money that is needed, and not more, to abate significant public health risks. Protection of the public health necessarily involves "the rational management and equitable distribution of health care resources." [8] Money not wasted can be redirected to produce other environmental, health, and safety benefits.

Lead Industries' exclusion of economic considerations from environmental decision making was not only erroneous when decided, as will be demonstrated below, but the decision also stands decidedly out of the mainstream of environmental policy. The *Lead Industries* straitjacket is fundamentally at odds with the nearly universal understanding, shared by the current Administration, that overall social well-being suffers "if environmental protection strategies deliver low results at a high cost. Resources for other economic and social needs will be diverted

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[8] Harvard Sch. of Pub. Health Presentation For The Monthly Meeting Of Dep't Chairs, *Definition of Public Health Practice* (May 23, 1997) <http://www.hsph.harvard.edu/php/presentation/tsld002.htm>.

if strategies to achieve environmental goals are not designed to achieve results in the most cost-effective way." [9] The President has issued an executive order requiring, among other things, the "design [of] regulations in the most cost-effective manner to achieve the regulatory objective." Exec. Order No. 12866, *reprinted in* 1993 U.S.C.C.A.N. B82, B83 (1993). That Order opens with a proposition that explains precisely why *Lead Industries* is misguided and must not survive:

> The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society . . . .

Id. at B82. The Office of Management and Budget ("OMB") minced no words in affirming the same principle: "The use of sound economic analysis in the design of regulations, such as the benefit-cost and cost-effectiveness analyses called for in E.O. 12866, is vital to generating maximum health, safety, environmental, and other benefits to society from the limited resources available." OMB, *Report to the President on the Third Anniversary of Executive Order 12866, Chapter 3* (Dec. 1996) <http://www.whitehouse.gov/OMB/inforeg/3_year_report.html>.[10] But as "vital" as such economic considerations are to generating maximum health and environmental benefits, *Lead Industries* would allow none of them. It had no warrant in the statute for doing so.

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[9] President Clinton's Council on Sustainable Dev., *Sustainable America: A New Consensus for the Prosperity, Opportunity and a Healthy Environment for the Future* (sic) (Feb. 1996) <http://www.whitehouse.gov/PCSD/Publications/TF_Reports/amer-chap2.html>.

[10] Congress has also codified cost-effectiveness principles in legislation discussed *infra*, at 24-25.

B. The Statute Does Not Limit EPA's Discretion To Consider Cost-Effectiveness

This Court does not lightly imply limits in statutes on the factors an administrative agency may consider in pursuing its statutory mandate. See, *e.g.*, *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 497 (1985); *Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151, 168 (1981); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 245-46 (1978). Given the importance of costs to sound risk management in health-and-safety regulation, it is always presumed that the implementing agency may consider them unless there is "a rather express congressional direction" to the contrary. *Michigan* v. *EPA*, No. 98-1497, 2000 WL 180650, at *12 (D.C. Cir. Mar. 3, 2000). No such direction can be gleaned from section 109.

1. Section 109 Calls For The Administrator, In The Absence Of A Bright Scientific Line, To Exercise "Judgment" In Determining What Is "Requisite To Protect The Public Health."

As more fully explored in the briefs of cross-petitioners, the text of section 109 neither contains nor suggests any strict limitation on the factors EPA may consider in determining the precise numeric level at which to set a NAAQS. Congress specifically provided that the level of standards is a matter for "the judgment of the Administrator," to be modified as she deems "appropriate" after public comment. 42 U.S.C. § 7409(b)(1), (d)(1). See *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 512 (1981) (finding such language to suggest wide discretion to consider any factor, including costs, absent contrary statutory directive). To be sure, the Administrator's judgment must be based on the section 108 air-quality criteria, 42 U.S.C. § 7409(b)(1), but this requirement does not dictate that the Administrator only consider one type of factor (disease incidence) and not others (*e.g.*, cost-effectiveness of alternatives for promoting health) in choosing among various standards that would

be consistent with those criteria. Nor can such a limitation on the Administrator's judgment be implied from the requirement that she pick a standard "requisite to protect the public health," *id.* Unlike a "Delaney Clause" straitjacket, the Clean Air Act calls for judgment and balance, not mechanical application. In selecting what treatment prescribe is "requisite" to ensure the patient's health, a good doctor would consider not only how the disease would respond to each treatment, but how the patient's overall health and quality of life would be affected. Congress expected no less of the Administrator.

That Congress gave the Administrator freedom of judgment in choosing among health-protective standards is confirmed by the limitation on EPA's power to set NAAQS only for pollutants "which may *reasonably* be anticipated to *endanger* public health or welfare," 42 U.S.C. § 7408(a)(1)(A) (emphasis added), and by section 109's directive that the Administrator "allow[] an adequate margin of safety" in setting the standard, *id.* § 7409(b)(1). Such "safety" and "reasonableness" language suggests that Congress intended EPA to make inherently economic judgments about the relative significance of the risks in question. See *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 642 (1980) (plurality); *Michigan*, 2000 WL 180650, at *11-*12. Furthermore, while *Lead Industries* correctly noted that the margin-of-safety provision reflected concern over scientific uncertainty, 647 F.2d at 1150, such concern cannot explain why Congress gave the Administrator the discretion to choose any margin of safety that she deems "adequate." In enacting this language in 1970, Congress clearly did not mean for the Administrator to choose the most stringent health-protective margin of safety, as she would if she were considering only narrow health data. Congress was instead giving the Administrator discretion to consider all relevant factors.

Thus, nothing in section 109 requires the Administrator to blind herself to economic considerations and cost-effectiveness

in choosing among relatively health-protective standards. Such a reasoned approach is fully consonant with the Act, which, significantly, declares that "[a] primary goal of this chapter is to encourage or otherwise promote *reasonable* Federal, State, and local government actions, consistent with the provisions of this chapter, for pollution prevention," 42 U.S.C. § 7401(c) (emphasis added), and seeks to enhance not only "the public health and welfare" but also the "the productive capacity of its population." *Id.* § 7401(b)(1). See *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (statute should be interpreted "in light of the purposes Congress sought to serve").[11]

2. EPA Relies On A Legally False Dichotomy That Purports To Allow Economic Considerations For The Implementation Phase But Not For Standard-Setting.

The broad language of section 109 does not support the narrow *Lead Industries* rule "barring EPA from considering any factor other than 'health effects' relating to pollutants in the air." Pet. App. 15a. In defending *Lead Industries*, the Government tries to sap section 109 of its proper vitality in two ways: by importing a limitation from section 108 that Congress left out of section 109, and by limiting to section 110, which governs state implementation plans, the cost-effectiveness and other practical considerations that properly belong in section 109.

The Government contends that the broad term "public health" in section 109 is limited to the "health effects" specified in

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[11] The *Lead Industries* court felt it necessary to follow the advice given by this Court in *TVA* v. *Hill*, 437 U.S. 153 (1978), to reject the invitation to "view the. . . Act 'reasonably,' " *id.* at 194. *See* 647 F.2d at 1150-51. But *Hill* was a case in which completion of the costly Tellico Dam was irreconcilable with the statutory goal of saving the endangered snail darter. By contrast, considerations of cost-effectiveness are intrinsic, not opposed, to protection of the public health.

108(a)(2), which calls for the development of scientific criteria regarding the health effects which "may be expected from the presence of such pollutant in the ambient air." 42 U.S.C. § 7408(a)(2). See U.S. Opp. 10 ("Section 108(a)(2) makes no mention whatsoever of effects from *implementing* the NAAQS—it mentions only effects resulting from the presence of a criteria pollutant in the air"). But that construction renders Congress's choice of broader language in section 109 a nullity, and violates the canon of construction that Congress uses distinctive words in the same statute for a purpose. *Public Lands Council* v. *Babbitt*, 120 S. Ct. 1815, 1826 (2000). Congress intended the primary NAAQS to be based on the section 108 criteria, see 42 U.S.C. § 7409(b)(1), but chose broader language to give rein to the Administrator's expert regulatory judgment. Any interpretation suggesting that the Act's public-health mandate prohibits the Administrator from considering health tradeoffs is unreasonable and must be rejected.[12]

The Government also attempts to bleed section 109 of its content by contending that "costs or [other] alleged adverse effects," U.S. Opp. at 10, from compliance with a NAAQS come into play only at the implementation stage of section 110 of the Act, 42 U.S.C. § 7410, where "Congress provided the States

[12] For example, there is no conceivable reason why Congress would preclude EPA from taking into account evidence that further reductions of ozone may exacerbate ultraviolet radiation, and perhaps result in a net increase in cancer. C. Boyden Gray, *The Clean Air Act Under Regulatory Reform*, 11 Tul. Envtl. L.J. 235, 253-54 (1998). Moreover, a rational regulatory scheme would allow EPA to consider the substitution health risks (such as increased heat-related deaths) of more expensive air conditioning as utilities pass through NAAQS-related costs. *See* Jan C. Semenza et al., *Heat-Related Deaths During The July 1995 Heat Wave in Chicago*, 335 New Eng. J. Med. 84, 87 (1996) (finding air-conditioning access to be the single greatest protection from heat-related mortality, reducing it by 80%); Gray, *supra*, at 254-56 (recounting evidence that the poor will reduce their air conditioning usage to save money, with deadly consequences).

with flexibility in the implementation process to consider the economic and technical feasibility of attainment." U.S. Opp. at 13. According to the Government, given this scheme of state-by-state flexibility, it "would make little sense if EPA had to promulgate NAAQS based on an analysis of costs and related implementation factors at the outset of the regulatory process." *Id.* at 12.

There is, however, nothing in the statutory scheme or in-common sense which postpones assessment of the public health issues (as distinguished from the simpler pollutant-related effects) from section 109 to 110. As the detailed requirements of section 108 make abundantly clear, section 109 does not constitute the "outset of the regulatory process," but follows a very lengthy fact-gathering process designed to inform the rulemaking. Moreover, the Government's premise—that states individually have flexibility under section 110 to cope with the total public health and economic impact of the NAAQS—is way off base. As this Court noted in *Union Electric*, section 110 only permits states to consider costs in allocating industry burden if to do so would not interfere with meeting an attainment deadline. 427 U.S. at 268. But full attainment never occurred with the old ozone standard, and EPA does not foresee it for the new ozone standard or the new $PM_{2.5}$ standard. See *infra* at 27-29. Put another way, in the Government's view economics may be considered only when they don't really matter—*i.e.*, when a state is in attainment and its economy is not under stress.[13] Moreover, allowing state-by-state cost-related adjustments in

[13] The Government acknowledges as an afterthought that the limits of *Union Electric* reflect the fact that Congress "reserved to itself the prerogative of deciding—as a matter of legislative choice—whether and how to alter the statutory scheme if public health needs should prove to conflict with an industry's economic viability." U.S. Opp. at 13-14. But Congress did not put EPA in a straitjacket, and, as we show below, EPA does in fact exercise its own judgment to relax attainment goals on the basis of economic factors. *See infra* at 27-29.

the absence of full attainment would permit states to gain unfair advantage over competing states by imposing lower compliance costs, and would create impossible demands on downwind states, a condition Congress expressly prohibited in the 1990 Amendments. See *infra* at 24.

EPA's reading of the statute also conflicts with a telling provision of Section 109 added in the 1977 Amendments, but ignored by *Lead Industries*. This new provision, Section 109(d)(2), provides that CASAC must advise EPA about, among other things, "any adverse public health, welfare, social, economic or energy effect which may result from various strategies for attainment and maintenance of such" NAAQS. 42 U.S.C. § 7409(d)(2)(C). The court below, bound by *Lead Industries*, dismissed the relevance of this provision by ruling that the "advice required in Section 109(d)(2)(C)(iv) is pertinent only to the EPA's duty under Section 108 to provide the States with control strategy information." Pet. App. 21a. But this is plainly wrong, for nothing in the text or logic of the statute confines CASAC's advice to the states only. The court cites section 109(d)(1) as authority for the state-advice limitation, *id.*, but that section says nothing about either the states or subsection (d)(2). Indeed, it is counterintuitive as well as countertextual to exclude the advice CASAC is required to provide under 109(d)(2) from section 109's standard-setting process. This is simply another case of EPA donning blinders to constrict the exercise of expert judgment.

In sum, the claimed dichotomies between health and economics, and between NAAQS promulgation and state implementation, are false ones. EPA cannot very well "protect the public health" without considering all factors, direct and indirect, that bear upon it.

3. The Legislative History Confirms That Congress Did Not Intend To Limit The Factors The Administrator May Consider.

In placing a rulemaking straitjacket on the EPA, *Lead Industries* relied principally on the legislative history. The many sources cited establish the uncontested proposition that there are no overriding technical or economic feasibility constraints on the Administrator's ability to set standards requisite to protect the public health, see 647 F.2d at 1148-55, but none supports the very different proposition that the Act does not "permit[] the Administrator to consider economic or technological factors in promulgating air quality standards," *id.* at 1150. A closer examination of the history of the 1970 Amendments shows that no such limit on the Administrator's discretion was contemplated.

Before the 1970 Amendments, the setting of standards was reserved to the states, subject to review and approval by the Secretary of Health, Education, and Welfare ("HEW"). Under the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, the Secretary of HEW issued air quality criteria and information on air pollution control techniques that included "technical data relating to the technology and costs of emission control" and "cost-effectiveness analyses," *id.* § 107(b)(1) & (c), 81 Stat. at 491. Upon receiving the criteria and control techniques, the states developed air quality standards, which were to be approved "if the Secretary determines that such State standards are consistent with the air quality criteria and recommended control techniques issued pursuant to section 107." *Id.* § 108(c)(1), 81 Stat. at 492. Significantly, Congress thus permitted considerations of costs and technology in setting the standards even though the 1967 Act was premised on the philosophy that "[c]onsiderations of technology and economic feasibility ... should not be used to mitigate against protection of the public health." S. Rep. No. 90-403, at 2 (1967). This is the very distinction that *Lead Industries* missed.

The standards set by the states under the 1967 Act were acknowledged to be "social-political decisions" by the states that reflect "the desired socio-economic status of those particular regions," but which were to be both based on and constrained by HEW's air-quality criteria. *Hearings Before the Subcomm. on Air and Water Pollution* (1970) ("*1970 Hearings*"), *reprinted in* 2 Committee on Public Works, 93d Cong., *Legislative History of the Clean Air Act Amendments of 1970*, at 1183-84 (Comm. Print 1974) ("*Legislative History*") (Statement of Dr. John T. Middleton, Commissioner, National Air Pollution Control Administration). HEW identified fixed numeric levels from the criteria documents which were to be a ceiling on the concentrations the state standards could allow, and would not approve more lenient standards. *Id.* at 1187. For the two pollutants discussed in the testimony, sulfur oxide and particulate matter, these were the levels where reliable scientific evidence established "probable" adverse health effects that were, in effect, significant risks: the 0.04 ppm annual mean for sulfur dioxide was associated with an increase in mortality from bronchitis and other respiratory diseases, HEW, *Air Quality Criteria for Sulfur Oxides* 9-10 to 9-11 (1969), and the 80 $\mu g/m^3$ level for particulate matter was associated with increased death rates for persons over 50 years old, HEW, *Air Quality Criteria for Particulate Matter* 189 (1969). See *1970 Hearings*, *reprinted at* 2 *Legislative History* at 1187. Beyond these fixed ceilings, the states, as part of their risk-management decision making, had the responsibility to set "margins of safety" that would take into account other factors, including "long-term effects on health." *Hearings Before the Subcomm. on Pub. Health and Welfare* (1969), *reprinted in* 2 *Legislative History* at 1255 (excerpts from criteria documents).

The 1970 Amendments intervened before the 1967 Act process was complete. The Nixon Administration pressed for national standards in recognition of the national dimension of pollution, to shift state resources to implementation, and to accelerate a process bogged down in the cumbersome federal-state mechanisms of the 1967 Act. *1970 Hearings*, *reprinted in* 2 *Legislative History* at 974 (statement of Hon. Robert H. Finch, Secretary, HEW). There is no indication anywhere in the legislative history that Congress, in federalizing the standard-setting function, intended to change the factors that could be considered in setting standards. To the contrary, the legislative history is replete with statements that the 1970 Amendments continued the approach of the 1967 Act,[14] and simply transferred the standard-setting function to the federal government. *1970 Hearings*, *reprinted in* 2 *Legislative History* at 983 (statement of Hon. Robert H. Finch, Secretary, HEW). The Administration's testimony before Congress emphasized the continuity with the 1967 Act. The national standards would continue to be below the level at which scientific evidence in the air-quality criteria demonstrated dangers to the public health. *Id.* at 999, 1000 (remarks of John Veneman, Under Secretary, HEW). But now it would be EPA which makes the overall risk-management judgments that formerly belonged to the states, although individual states would be entitled to go farther, *Union Electric*, 427 U.S. at 263-65. Nothing indicates that Congress intended to forbid EPA to consider the factors that states formerly weighed (or that these factors were only to be considered by the states at the implementation stage).[15]

While the 1970 Amendments omit language from the 1967 Act requiring consistency of air-quality standards with "recommended control techniques issued pursuant to section 107," Pub.

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[14] *See* Senate Debate on S. 4358 (Sept. 21, 1970), *reprinted in* 1 *Legislative History* at 227 (remarks of Sen. Muskie) ("That concept and philosophy are behind every page of the proposed legislation."); *see also id.* at 225, 229.

[15] *Cf. 1970 Hearings*, *reprinted in* 2 *Legislative History* at 1186 (remarks of Sen. Baker) (determining where a national standard "ought to be set" requires consideration of, *inter alia*, "the economic impact [of] dislocations").

L. 90-148, § 108(c)(1), 81 Stat. at 492, this does not suggest the contrary. That omission reflects only that feasibility concerns would not trump health given the "'technology-forcing'" character of the 1970 Amendments. *Union Elec.*, 427 U.S. at 257. And, in any case, such language would have been superfluous because weighing costs is subsumed in the authority given to EPA to set "an adequate margin of safety" and make the ultimate determination of what standard is "requisite to protect the public health." The continuing structure of the Act, however, confirms that control technique and cost data gathered under what is now section 108 (formerly section 107 of the 1967 Act) are still available for the Administrator's consideration. Such data still must be compiled and issued "[s]imultaneously" with the criteria documents, 42 U.S.C. § 7408(b)(1), and must be made available for public comment at the same time a NAAQS is *proposed*, *id.* § 7409(a)(1)(B) & (2)—a provision which would make no sense if the Administrator could not consider such data (or comments thereupon) before finalizing the NAAQS. Indeed, the congressional debates indicate that the use of such information in setting standards was contemplated.[16]

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[16] *See* Senate Debate on S. 4358 (Sept. 22, 1970), *reprinted in* 1 *Legislative History* at 341 (remarks of Sen. Randolph) (offering successful amendment requiring advisory committee on control issues because it is "easy for Government to arrive at a set figure for industry to meet without giving due consideration to whether those requirements are obtainable on the basis of available control technology"); House Debate on H.R. 17255 (June 10, 1970), *reprinted in* 2 *Legislative History* at 809 (remarks of Rep. Springer) ("As the scientific details emerge and the control methods are developed, the air quality standards for the entire nation will be adjusted accordingly."). The 1977 legislative history likewise indicates that costs and technology could be considered in setting NAAQS. *See, e.g.*, H.R. Rep. No. 95-294, at 127 (1977) (rejecting argument that NAAQS could be set at a zero-risk level because such an approach "ignores all economic and social consequences and is impractical"); Senate Debate on S. 252 (June 10, 1977), *reprinted in* 3 *Legislative History* at 1030 (remarks of Sen. Muskie) (NAAQS are "the minimum reasonably attainable").

4. *Lead Industries* Is Inconsistent With EPA's Interpretation Of Analogous Provisions Of The Clean Water Act.

Untenable in its own right, EPA's adoption of *Lead Industries* also cannot be reconciled with its interpretation of analogous language in section 303 of the Clean Water Act ("CWA") for setting *water* quality standards. Under section 303, the states set water quality standards based on a designation of the "uses" of a body of water—such as fishing, swimming, drinking, recreation, and protection and propagation of fish and wildlife—and the scientifically derived "water quality criteria" that are required to protect those uses. 33 U.S.C. § 1313(c)(2); EPA, *Water Quality Standards Handbook* INT-8 to INT-10, 2-1 to 2-4, 3-1 to 3-33 (2d ed. 1994) ("*Water Quality Standards Handbook*"). The standards (which are subject to review by the Administrator) must be set "to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A). In implementing their water quality management program, states must impose whatever controls are necessary to implement the water quality standards. *Water Quality Standards Handbook* at INT-13.

Despite the similar "protect the public health or welfare" mandate, and no statutory provision for consideration of costs or feasibility,[17] EPA has interpreted section 303 to allow a "cost-sensitive" approach to the setting of water-quality standards. 2 William H. Rodgers, Jr., *Environmental Law: Air and Water* § 4.19, at 291 (1986). Thus, if a particular use is not already

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[17] Of the statutory purposes that may be considered, *see* 33 U.S.C. §§ 1251(a), 1313(c)(2), the only one that mentions feasibility constraints is the provision setting, "wherever attainable, an interim goal" of achieving water quality protective of fish, shellfish, and wildlife by July, 1983. *Id.* § 1251(a)(2). That purpose is irrelevant to the EPA's regulation, which was promulgated in November, 1983 and is still in force. *Cf.* 48 Fed. Reg. 51,405 (1983).

existing, the states or the Administrator (if acting in place of a state) may adjust water quality standards to take into account certain natural or manmade conditions that prevent the attainment of a designated use, 40 C.F.R. § 131.10(g)(1)-(5), collateral environmental damage that would be caused by attempt ing such attainment, *id.* § 131.10(g)(3), and any "substantial and widespread economic and social impact" that would be caused by imposing controls more stringent than those required by other provisions of the CWA, *id.* § 131.10(g)(6). There is no reason to interpret section 109 of the CAA differently.

5. Congress Did Not Intend To Depart From Fundamental Principles Of Risk Management.

Lead Industries is not only contrary to the broad language and history of section 109, but it also failed to recognize the well understood distinction between "risk assessment" and "risk management." Setting a binding air-quality NAAQS is plainly an exercise in risk management, which requires discretion and consideration of non-health factors.

Any regulatory system dealing with hazardous substances "has two basic parts, a technical part, called 'risk assessment,' designed to measure the risk associated with the substance, and a more policy-oriented part, called 'risk management.'" Stephen A. Breyer, *Breaking the Vicious Circle* 9 (1993).[18] "Risk assessment is the systematic, scientific characterization of potential adverse effects of human or ecological exposures to hazardous agents or activities." 2 The Presidential/Congressional Comm'n on Risk Assessment and

[18] The basic framework and terminology for risk regulation was most comprehensively outlined in National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983), based on analysis of then current and prior regulatory schemes. *See id.* at 2.

Risk Management, *Final Report: Risk Assessment and Risk Management in Regulatory Decision-Making* 2 (1997) ("*Commission Report*"). Because of data, measurement, and methodological uncertainties that result in "several scientifically plausible approaches ... with no definitive basis for distinguishing among them," there are policy choices in risk assessment. National Research Council, *Science and Judgment in Risk Assessment* 27 (1994) ("*Science and Judgment*"). But they are strictly "science-policy" choices that "are distinct from the policy choices associated with ultimate decision-making." *Id.* The development of air quality criteria, which catalog the health and welfare effects from the presence of pollutants "in varying quantities," is a risk-assessment activity. 42 U.S.C. § 7408(a)(2).

Risk management, on the other hand, "is the process of identifying, evaluating, selecting, and implementing actions to reduce risk to human health and to ecosystems," with the goal of "scientifically sound, cost-effective, integrated actions that reduce or prevent risks while taking into account social, cultural, ethical, political, and legal considerations." 2 *Commission Report* at 2; *Science and Judgment* at 28 ("*Risk management* is the term used to describe the process by which risk-assessment results are *integrated with other information* to make decisions about the need for, method of, and extent of risk reduction.") (second emphasis added). In making policy choices among regulatory options, the risk manager evaluates, for example, the extent to which the regulation will diminish the risk; the *different* health risks, lost benefits, and costs associated with the regulation; and obstacles to its enforcement. Breyer, *supra*, at 10.

The Administrator's setting of NAAQS, which establishes a legally binding level of risk that governs state regulation of polluting sources, is the fundamental risk-management decision for these pollutants. Yet under *Lead Industries*, all that the Administrator—despite being a senior Cabinet official, subject to the direction of the President, with broad expertise in all aspects of environmental regulation—may do is make the science-policy

choices typically associated with a risk assessment (*i.e.*, the development of air-quality criteria). The Administrator, in this view, must regulate with blinders on, oblivious to whether the standard she sets will harm the public more than an equally scientifically permissible alternative, despite her broad gathering of "data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology," 42 U.S.C. § 7408(b)(1); the advice she receives from CASAC on "adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of [the NAAQS]," *id.* § 7409(d)(2)(C); and her mandate to study the costs and benefits associated with compliance with each NAAQS, *id.* § 7612(a)(1). *Lead Industries* defies not only the statutory text and structure, but also the common sense that *Brown & Williamson* demands. 120 S. Ct. at 1301.

Risk management is especially important when scientific evidence is ambiguous. Particularly in the case of nonthreshold pollutants,[19] science generally draws no bright line between standards that are "protective" and those that would be "unprotective." EPA acknowledges that the Act does not require it to eliminate all health risks, and thus it must draw the line between "protected" and "unprotected" populations. To justify not fully protecting everyone against all adverse health consequences, the agency must balance the relative significance of health risks vis-à-vis abatement costs and other collateral effects. If EPA is to consider stringent ozone and PM regulation in the face of mas-

[19] It has long been understood that ozone, particulate matter, and other criteria pollutants are nonthreshold pollutants, meaning that there is a continuum of adverse health effects at any exposure level above zero. Pet. App. 5a. *See also* Senate Debate on S. 252 (June 8, 1977), *reprinted in* 3 *Legislative History* at 781-82 (remarks of Sen. Muskie) (noting "14 years" of testimony that "[t]here is no threshold health effect which can be used to say that above this threshold there is danger to health and below it there is not").

sive uncertainty, see *supra* at 2-3, at least it should be able to consider the enormous costs of these doubtful precautions.

Thus, to paraphrase the D.C. Circuit's discussion of a closely related provision of the original Act, "[t]hough the phrase 'to protect the public health' evinces an intent to make health the primary consideration, there is no indication of the factors the Administrator may or may not consider in determining, in his 'judgment,' what level of [ambient pollutant] will provide an '[adequate] margin of safety.'" *National Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146, 1155 (D.C. Cir. 1987). The Administrator would not comply with section 109 by setting a standard that did not protect against the level where scientific data demonstrate a significant risk to the public health; she would have failed to set a standard "requisite to protect the public health." But beyond that, the Administrator is free to do what is best for the American public, based on consideration of all relevant factors.

II. CONGRESS HAS NOT ACQUIESCED IN *LEAD INDUSTRIES*.

As Members of Congress, we urge this Court to pay little attention to EPA's argument that Congress has implicitly acquiesced in *Lead Industries* by failing to overrule it in the intervening decades. *PM Rule*, 62 Fed. Reg. at 38,685. This Court rightly looks with great disfavor on arguments of congressional acquiescence. *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 186 (1994). Acquiescence arguments are especially weak here, given that environmental legislation is "always" an area of "legislative struggle." *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 847 (1984). The inability of Congress to overrule a judicial decision favored by certain political interests does not suggest that the decision was rightly decided in the first place. Indeed, far from ratifying *Lead Industries*, Congress has enacted new legislation that unquestionably reflects new statutory imperatives to analyze and con-

sider economic factors, including net benefit maximization and cost-effectiveness, in environmental rulemaking. See *Vermont Agency of Natural Resources* v. *United States*, 120 S. Ct. 1858, 1870 n.17 (2000) ("it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted").

As an initial matter, *Lead Industries* is difficult to reconcile with the 1990 Amendments to the Clean Air Act. This legislation fostered greater EPA responsibility over state implementation in order to promote cost-effective regulation. Two provisions are particularly germane. First, addressing the problems of interstate transport of acid rain and ozone which cannot be mitigated by individual states acting alone, Congress required EPA to order upwind states to curtail emissions that contribute "significantly" to downwind nonattainment, 42 U.S.C. § 7410(a)(2)(D)(i)(I) — so that the Midwestern states have to take action to mitigate the pollution they send eastward to New England and the Mid-Atlantic. EPA has openly (and rightly) interpreted the "significant" contribution rule to allow consideration of the relative costs of reducing pollution, even though the relevant statutory text provides no more express authority for such considerations than does section 109. See *Michigan*, 2000 WL 180650, at *12-*13 (upholding agency interpretation). If it is going to excuse upwind states from full compliance based on costs, EPA must equitably adjust the compliance requirements of downwind states (which cannot attain NAAQS on their own). Second, Congress amended section 110 to provide for the incorporation of economic incentives in state implementation plans ("SIPs"), see 42 U.S.C. § 7410(a)(2)(A). But for such incentives to work, EPA's anticipation of such implementation policies is required at the NAAQS promulgation stage. In other words, considerations of costs and collateral effects permeate the entire NAAQS regulatory scheme, and for that scheme to work rationally, the Administrator must have broad discretion to consider such factors throughout the standard-setting and implementation process. Indeed, Congress in 1990 also directed the Administrator to consider the costs and benefits associated with NAAQS compliance. 42 U.S.C. § 7612(a)(1).

Furthermore, the Clean Air Act must be construed *in pari materia* with later-enacted regulatory reform statutes that direct agencies to favor cost-effective regulatory decisions and to mitigate unwarranted regulatory burdens where possible. See *Vermont Agency*, 120 S. Ct. at 1870 n.17. The Unfunded Mandates Reform Act ("UMRA") requires EPA, like all agencies, to select the most cost-effective regulatory alternative (or, alternatively, to explain why a cost-effective option was not chosen). Pub. L. No. 104-4, § 205, 109 Stat. 64, 66 (1995) (codified at 2 U.S.C. § 1535). The Small Business Regulatory Enforcement Fairness Act ("SBREFA") compels agencies to consider and minimize the "significant economic impact" of regulations on "small entities." Pub. L. No. 104-121, § 241(b)(5), 110 Stat. 847, 864 (1996) (codified at 5 U.S.C. § 604(a)(5)). EPA is correct that UMRA and SBREFA do not override the mandates of an agency's organic statute, see 2 U.S.C. § 1535(b)(2); 5 U.S.C. § 604 (a)(5), but, absent clear inconsistency, the Act should not be interpreted to defeat Congress's clear directive in favor of cost-effective regulation.

III. OVERRULING *LEAD INDUSTRIES* WOULD END THE NAAQS CHARADE.

In the end, the true measure of the unreasonableness of *Lead Industries* is the charade it induces, in which EPA masks its policy judgments as scientific findings to comply with an irrational legal standard. Moreover, EPA, unwilling to force full attainment of NAAQS that are established pursuant to *Lead Industries*, subverts the NAAQS scheme by creating cost-of-compliance caps without authority or explanation. The result is extra-statutory regulation that evades agency accountability to Congress, the courts, and the public.

EPA acknowledges, as it must, that the "Act does not require the Administrator to establish a primary NAAQS at a zero-risk level." *PM Rule*, 62 Fed. Reg. at 38,653. Any contrary construction would be nonsensical for nonthreshold pollutants. But if "zero risk" is neither legally required, nor established as a goal by EPA, then the Agency must justify setting a level of risk that is not stringent enough to protect everyone—*i.e.*, certain groups of unusually sensitive individuals will suffer health impairment while others of average or lesser sensitivity will not.

EPA purports to distinguish among health risks based on " 'decisional criteria' " such as "the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of the sensitive populations at risk." Pet. at 15 n.9, *Browner* v. *American Trucking Assn's*, No. 99-1257 (filed Jan. 2000), *Ozone Rule*, 62 Fed. Reg. at 38,883. In truth, these "decisional criteria" imply a *de facto* balancing of net benefits and costs of abatement. How otherwise could EPA defend denying health protections to one population but not another if the costs of protecting them were low? See Breyer, *supra*, at 65 ("tiny costs may warrant stricter standards aimed at tiny risks"). The only democratic and moral justification for setting standards at levels that do not protect all individuals equally against the *same* harms is that doing so would require a disproportionate, cost-ineffective allocation of society's resources.

EPA has acknowledged the widespread, general perception that it adjusts science to fit policy,[20] but in the case of the NAAQS, EPA still refuses to admit it is making economic choices under the guise of "science." Scholars, however, have unearthed evidence that behind closed doors, EPA does consider

[20] EPA, *Safeguarding the Future: Credible Science, Credible Decisions* 36-37 (1992).

costs.[21] By overruling *Lead Industries*, this Court would bring EPA's true bases of decision out of the shadows for judicial, congressional, and public scrutiny, and thus ensure the agency's accountability and fidelity to the Act.

For example, despite its argument that cost considerations and other alleged implementation effects come into play only on a state-by-state basis in the implementation process, U.S. Opp. at 13, EPA established a uniform $10,000 per ton compliance cap in a memorandum issued by the President the same day the two rules were issued. Under the mantle of "cost-effective implementation," an unidentified "interagency Administration group" gave notice on the day the NAAQS were issued that "[i]t was agreed that $10,000 per ton of emission reduction is the high end of the range of reasonable cost to impose on sources," and that "EPA will encourage" (and no doubt approve) SIPS that do not exceed those caps. *Implementation Plan for Revised Air Quality Standards*, 62 Fed. Reg. 38,423, 38,429 (1997). Such a maneuver raises serious questions. There is no mention of any statutory authority for EPA (or the Administration generally) to authorize cost caps that frustrate attainment of the NAAQS, and indeed none exists. There is no rationale given for the $10,000 cap, no explanation of the public-health tradeoffs, and no legal justification of the anti-attainment implications of the $10,000 cap for attainment or its interplay with other implementation mechanisms approved by EPA. It thus appears that it will not be the newly set NAAQS, or even state-by-state decisions, but rather an unexplained administrative policy, un-

[21] Wagner, *supra*, at 1641-43 & n.101 (discussing evidence in an earlier NAAQS rulemaking that "[t]he economic impact of the selected standard or alternate standards ... were clearly considered by the Administrator"); *see also* 1 William H. Rodgers, *supra*, § 3.8, at 252; *PM Rule*, 62 Fed. Reg. at 38,680-82 (declining to set a more stringent secondary PM NAAQS to protect visibility because of costs—the unacceptability of "requir[ing] elimination of all eastern anthropogenic emissions"—and the availability of an alternative control strategy—the regional haze program).

rooted in any statute and unreviewed by any court, that will principally govern the sufficiency of compliance actions under EPA regime.

Even though attainment is the "heart" of the NAAQS scheme, *Train* v. *National Resources Defense Council, Inc.*, 421 U.S. 60, 66-67 (1975), it is a chimera under EPA's current approach. In its *Final RIA*, EPA adopted a $1 billion/µg/m3 cap on PM compliance costs in order "to eliminate control measures that . . . are extremely costly relative to the air quality benefit they achieve." *Final RIA*, at 6-14; *see also* Innovative Strategies and Econs. Group, EPA, Draft Document, *Regulatory Impact Analysis for Proposed Particulate Matter National Ambient Air Quality Standard* 7-6 (Dec. 1996) (control measures beyond the $! billion/µg/m3 cut-off are "extreme measures that are unrealistically cost-ineffective," achieving "minimal air quality improvements at unreasonably high cost"). With such a cap for PM, together with the $10,000-per-ton cap for both pollutants, EPA recognizes that full attainment for ozone and PM would not be achieved during the analyzed period. *Final RIA*, at ES-11 to ES-12. Given the President's direction to the Administrator that the NAAQS "be carried out to maximize common sense, flexibility, and cost-effectiveness," Memorandum of July 16, 1997, 62 Fed. Reg. 38,421, 38,421, EPA will not pursue full attainment. Thus, the overly stringent NAAQS set under *Lead Industries* are nullified through the back door. The purposes of the Act would be better served by considering cost-effectiveness *openly* in setting the NAAQS.

The Government may well argue that its cost-effectiveness strategies are not being provided as part of Section 109, but rather as part of the implementation process under Section 110. But the states have not yet even to begun to work on their SIPs. Moreover, and perhaps more importantly, the Government also argues that Congress reserved for itself the authority to relax attainment requirements if costs become unsustainable. U.S. Opp. at 13-14. Yet, while EPA claims that the law precludes it

from establishing cost-effective cut-offs, it nonetheless goes ahead and does so. And all of this takes place without the agency complying with any objective standards or being subject to any oversight and review.

Compounding the oversight and review problem is the fact that after setting a $10,000-a-ton cut-off for compliance purposes, EPA later set a $2,000-per-ton cap for purposes of determining control of "significant" interstate pollution transport. See *Michigan*, 2000 WL 180650, at *2 (discussing cap for nitrogen oxides, an ozone precursor). This lesser figure leaves downwind states with the obligation to fund up to $10,000-a-ton for reductions that may well be much more cheaply obtained upwind. In fact, the $2,000 transport cap may well operate as a *de facto* cap for *all* sources in the affected upwind states, since those tons that go downwind are indistinguishable from those that do not.

Even if there are no insuperable coordination problems here, surely a reviewing court is entitled to understand how a particular cut-off number is calculated—and whether $10,000 is a lot or a little, and whether the difference between $2,000 and $10,000 is a lot or a little. The D.C. Circuit was presented with reasoning relating to the $2,000 figure in the *Michigan* case. See Brief for Respondent United States at 58-67, *Michigan*, 2000 WL 180650. The reviewing courts—and the states and their sources—are entitled to no less with respect to the far more important and all-encompassing $10,000 number.

In short, Congress intended the cost-effectiveness of NAAQS to be considered, but not as part of a closed-door and unreviewable Administration compromise that effectively undermines the NAAQS scheme. Rather, as the text, history, and structure of section 109 make clear, Congress wanted the EPA Administrator to consider such factors openly in setting NAAQS, subject to judicial review of the adequacy of her reasons and her conformity to the statutory mandate "to protect the public health."

Lead Industries stands in the way of vindication of the congressional scheme, and it should be overruled.

CONCLUSION

For the reasons above, the judgment of the court of appeals should be reversed and the EPA rules remanded.

Respectfully submitted,

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NO. 99-1426

IN THE
SUPREME COURT OF THE UNITED STATES

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL

Cross-Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia

BRIEF OF *AMICUS CURIAE* OF ALCAN ALUMINUM CORPORATION IN SUPPORT OF CROSS-PETITIONERS

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QUESTIONS PRESENTED

Whether the Clean Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors "other that health effects relating to pollutants in the air," given that consideration of such factors would permit both Agency and reviewing courts to avoid confronting constitutional non-delegation issues.

INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae, Alcan Aluminum Corporation ("Alcan") is a subsidiary of Alcan Aluminum Limited, a Canadian Corporation. Alcan is engaged in the business of aluminum smelting and fabrication. It has major manufacturing facilities in the United States, which are subject to regulation by the Environmental Protection Agency as well as other federal agencies. It employs 4500 men and women and operates facilities in 13 States. Because of the substantial investment in operations in the United States, Alcan has a direct interest in insuring that the regulatory activities by federal agencies are predicted on a reliable basis to insure that the actions which Congress sought to achieve are in fact attained and that the regulated are not subjected to unnecessary costs which do not achieve the intended benefit.

SUMMARY OF ARGUMENT

Alcan believes that the manner in which present constitutional issue is framed by the lower court, presents an inescapable implication in the position of the United States Environmental Protection Agency ("EPA") that it is not required to, and in fact has not complied, with the reliability requirement for the promulgation of standards.

By taking the position that it is not obligated by the Clean Air Act to undertake a cost-benefit analysis, the EPA has implicitly conceded that it does not have the substantiation and has not undertaken the appropriate effort in the rulemaking process to comply with the reliability requirements of 42 USC §7607. This shortcoming is a two-prong failure. First, to properly evaluate

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief. Consent letters for all parties have been filed with this brief.

benefits, one must necessarily evaluate costs. Among the costs to be considered are not merely the costs of implementing the standards in terms of absolute dollars to the regulated, but the consequences of the standard's impact from a comprehensive standpoint to insure it does not result in changes of behavior of the regulated and the public such that any presumed reduction of risk from the standard is either negated or overall risk is enhanced.

The second part of the reliability requirement is to ensure that conclusions concerning risk associated with various limits on air standards complies with the requirements that this Court articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Before this Court resolves the constitutional issue presented unnecessarily, we urge this Court to consider a remand of this case for comprehensive review of the record to insure that the regulations at issue meet these reliability requirement.

ARGUMENT

I. A FEDERAL COURT SHOULD NOT RESOLVE A DISPUTE BY REACHING A CONSTITUTIONAL ISSUE WHEN THE CASE MAY BE RESOLVED ON ALTERNATIVE GROUNDS.

It is a well embedded principle that federal courts should not reach a constitutional issue if there is a non-constitutional ground for deciding the case. *See Gulf Oil Co. v. Bernard* 452 U.S. 89, 99 (1981); *Mobile v. Bolden*, 446 U.S. 55, 60 (1980); *Burton v. U.S.*, 196 U.S. 283,295 (1905); *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 347 (1936).

II. THE STATUTORY SCHEME CLEARLY REQUIRES THE EPA TO CONSIDER CONSEQUENTIAL COSTS OF THE PROMULGATION OF AIR QUALITY CRITERIA.

The EPA paraphrases its obligation under the Clean Air Act to use "the latest scientific knowledge" to develop air quality criteria based on "all identifiable effects on public health or welfare." Petitioners Brief at 4. The EPA has apparently interpreted 42 U.S.C. 7408 to limit its consideration exclusively to the impact of the pollutant alone on health. The present dispute before this Court arises because the EPA has taken the position that the statute does not permit it to consider economic impact, feasibility or significance of the risk. However, the EPA's statutory obligation to evaluate "all identifiable effects on public health or welfare" is more comprehensive than the simple dose-response analysis conducted by the EPA.

The statute further defines what it means by "all identifiable effects" to include "those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant." 42 U.S.C. 7408 (a) (2) (A). This broad requirement imposes on the EPA the obligation to evaluate the totality of the consequences of its proposed regulatory efforts. Even if the EPA is correct that it is not obligated to consider the economic impact on the regulated entity as a factor in itself, to the extent that such impact translates into adverse impact on public health or welfare, such as making needed energy for heating, cooling or transportation practically unavailable to certain groups such a requirement is mandated.

It appears clear that the EPA has developed no reliable data to address this requirement. In fact, it does not even appear to have reliable data to demonstrate the likely consequences of the approach it has chosen on the simple dose-response issue as contrasted with the other alternative options available. Thus concludes Professor Cass R. Sunstein[2] who studied the record in depth that the final rules at issue are not accompanied by any

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[2] Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. Law REV. 303, 328 (1999).

quantification of the risks associated with competing standards. Nor is there an explanation of the basic value judgment showing what level of risk was chosen and why they are requisite to protect public health.

This Court should remand this case with instructions to the EPA to develop the record as required by 42 U.S.C. 7408 (a) (2) (A).

III. IT DOES NOT APPEAR THAT THE BASIS ON WHICH THE EPA PROMULGATED THE CHALLENGED REGULATIONS IS BASED ON RELIABLE EVIDENCE AS REQUIRED BY *DAUBERT*.

This case is an appropriate case for this Court to confirm that the *Daubert* standard which established the standard for "reliability" for expert testimony in federal court is also applicable to agency rule making. *Daubert* and its progeny ""establishes a standard of evidentiary *reliability*."[3] Commentators have recognized the logical relationship between the reliability standard for admissibility and the same requirement for federal agency action:

> ...The APA has express language that directly supports the application of the Supreme Court's *Daubert* Four. APA section 556(d) states that "sanction may not be imposed or rule or order issued except...[when] *supported by* and in accordance with *reliable*, probative and substantial evidence.[4]

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3 *Kumho Tire Co. . Carmichael,* 118 S.Ct. 1167, 1175 (quoting *Daubert,* 125 L. Ed. 2d. at 482*).* (emphasis added).

4 Charles D. Weller and David B. Graham, *New Approaches To Environmental Law and Agency Regulation: The Daubert Litigation Standard,* 30 ELR 10557, 10568 (2000). The authors argue that there is no plausible reason why *Daubert* should not be applied to all agency adjudication or rule making., at 10569. In fact courts have already imported *Daubert* into agency rule making. *See: Libas v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1998).

The Federal Appellate Courts have recognized that any deference to an agency is based on its status as an expert and as such its position must comport with expert behavior. *See*: *Chicago Board of Trade v. SEC,* 187 F.3d 713 (7th Cir. 1999) (stressing that agency must act like an expert to receive deference) and *Bechtel v.FCC,* 10 Fed 3rd. 875 (D.C. Cir. 1993) (agency action set aside when it failed to undertake the empirical analysis to support factual propositions).

Since the EPA did not attempt to quantify the risks, it is virtually impossible to determine why the agency chose the standards it adopted. Without specification of the range of benefits attainable from various approaches, "there is a weak role for sound science in standard setting".[5] It is impossible to evaluate the reliability of the agency rulemaking because it is impossible to discern the basis for the EPA judgments.

CONCLUSION

For the foregoing reasons, Alcan believes that the EPA has not established that its standards are rooted in sufficiently reliable evidence. Accordingly, the Court should vacate the EPA ozone and particulate standards on this basis and remand this case with instructions to the EPA to promulgate new standards based on the reliability standard articulated in *Daubert*.

Respectfully submitted,

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5 Sunstein, *supra.*, at p. 363

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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND IN SUPPORT OF CROSS-RESPONDENTS

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QUESTION PRESENTED

Should the Court construe section 109 of the Clean Air Act, 42 U.S.C. § 7409, to require EPA to consider cost in setting national ambient air quality standards?

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INTEREST OF AMICUS CURIAE

The United States Public Interest Research Group Education Fund is a non-profit organization promoting democratic decision-making and environmental protection, with a long history of advocacy at the state and federal levels for clean air.[1] It has an interest in the protection the new ozone and particulate standards offer and in the legal principles that allow Congressional intent to control the implementation of laws protecting significant public interests.

INTRODUCTION

Industry and its supporters ask the Court to avoid deciding their non-delegation claim by construing section 109 of the Clean Air Act (Act), 42 U.S.C. § 7409, to require EPA to consider cost in setting National Ambient Air Quality Standards (NAAQS). *See* Opening Brief for Cross-Petitioners American Trucking Associations *et al.* at 24, 50 [hereinafter ATA Br.]; Opening Brief of Ohio, Michigan, and West Virginia in Support of Cross-Petitioners at 4-10. In addition, Industry urges this Court to invent a new clear statement rule, requiring agency consideration of cost absent explicit statutory language barring its consideration. *See* Opening Brief of Cross-Petitioner Appalachian Power *et al.* at 46-47 [hereinafter AP Br.]; Brief of Amicus General Electric in Support of Cross-Petitioners at 18 [hereinafter GE Br.]. This brief focuses upon these pleas for extraordinary construction of the Act.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus and its counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Congress has actively considered the statutory changes that Industry seeks from this Court, but has chosen not to amend section 109. Elected representatives, rather than unelected judges, should decide whether to revise the Act. *See United States v. Rutherford*, 442 U.S. 544, 555 (1979) (federal courts do not sit as councils of revision).

Statutory construction to avoid mere claims of unconstitutional delegations can subvert democratic values by improperly modifying numerous statutes. *See generally Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998). Because most statutes have their vagaries, any good lawyer can identify a "hard question" that a statutory provision does not answer. If the existence of an unanswered question triggers extraordinary judicial construction of a statute, then the judiciary may rewrite much of the United States Code. Furthermore, since judges can add specificity to statutes in several different ways their constructions will necessarily reflect their policy judgments. Addition of cost to section 109, however, renders it less intelligible by adding a factor without specifying which cost sensitive principle should govern the NAAQS. Proper application of the rule that only "grave" constitutional doubts trigger construction to avoid a constitutional issue precludes extraordinary construction of section 109 and avoids subversion of democratic values.

Industry's proposed clear statement rule, which would require agencies to consider cost absent an explicit contrary statutory statement, also subverts democratic values. The Industry clear statement rule conflicts with precedent designed to assure that administrative agencies and courts implement legislative policy. That precedent

directs agencies (and therefore reviewing courts) to base their decisions on the factors the statute explicitly makes relevant to agency decisions. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-13 (1971); *Union Electric Co. v. EPA*, 427 U.S. 246, 257-65 (1976); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 507-12 (1981). The Industry clear statement rule conflicts with this precedent by generally requiring consideration of a factor not listed in authorizing legislation.

This Court should not enact a clear statement rule to advance contemporary policy preferences that receive regular consideration in Congress. Industry encourages this Court to engage in Lochner-like review of the reasonableness of the policy of protecting public health from pollution, hoping to convince the Court to use a clear statement rule to favor consideration of cost. The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706, does not justify this approach to statutory "interpretation." Basing statutory construction on judicial assessment of the reasonableness of statutory policies would undermine objective statutory interpretation and democratic control.

Adding cost to section 109 would make reasoned decision-making under the APA more difficult. It increases the need for policy judgments that are difficult to rationalize, such as judgments about how to value human life and health. This change of statutory policy would make section 109 less "determinate" than it is now.

Industry's proposal for a clear statement rule favoring a cost-benefit test invites a return to the days when the Court discredited itself by creating general principles of law advancing contemporary economic theory. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes J. dissenting). This Court should decline the invitation.

ARGUMENT

I. ELECTED REPRESENTATIVES SHOULD DECIDE WHETHER TO REVISE SECTION 109 TO INCLUDE COST CONSIDERATIONS.

In recent years, elected officials have actively considered revisions to the Act like the revision of settled law Industry seeks from this Court. The 104th Congress, for example, considered, but rejected, legislation that might have applied a cost-benefit test to the Act and, indeed, substantially all government regulation. *See* H.R. 9, 104th Cong. § 422(a)(2), (b)(1) (March 10, 1995); S. 343, 104th Cong. § 523(a) (1995); 141 Cong. Rec. H2252 (1995) (bill would supersede Clean Air Act's "adequate margin of safety" requirement); S. Rep. 104-90, at 135 (1995) (additional views). That Congress also rejected revision of the Act in the legislation it did enact, The Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48, which only requires cost-benefit analysis (CBA) of major rules when the underlying law allows for consideration of cost. *See* 2 U.S.C. § 1532(a). Subsequent Congresses repeatedly rejected bills that might amend section 109. *See e.g.* S. 981, 105th Cong. (1998). Several of the Congressional amici urging this Court to modify section 109 sponsored some of these failed bills and have introduced legislation now before Congress to convert the Act into a cost-benefit statute. *See* S. 2362 § 703(c)(1)(A), 106th Cong. (2000).

Article I of the Constitution vests legislative authority in elected representatives so that citizens can democratically control significant policy choices, *see Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963), like the choice about whether to change cost's role under the Act, *cf. Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976) (states may

consider cost in writing regulations of pollution sources to achieve the NAAQS); Reina Steinzor, *Devolution and the Public Health*, 24 Harv. Envtl. L. Rev. 351, 352 (2000) (citing "consistent public support for more stringent environmental regulation"). Congress is far better equipped than a court to consider the many contending factual and policy arguments that bear on the issue of whether to require consideration of cost in section 109. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997). *See e.g. Thomas O. McGarity, A Cost-Benefit State*, 50 Admin. L. Rev. 7, 46-49 (1998) (debunking claim that regulatory costs cause serious health problems). Judicial revision of section 109 would be inappropriate.

II. THE NON-DELEGATION DOCTRINE DOES NOT JUSTIFY JUDICIAL REVISION OF SECTION 109.

The non-delegation doctrine only requires that Congress include an intelligible principle (i.e. a general policy directive) in laws delegating authority to administrative agencies. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). To convert this doctrine into an engine for reconstruction of statutes with policies as clear as section 109(b)(1)'s health protection principle would promote judicial, rather than democratic, governance, thereby subverting the non-delegation doctrine's principle aim.

A. SINCE ONLY "GRAVE DOUBTS" ABOUT CONSTITUTIONALITY TRIGGER CONSTRUCTION TO AVOID A CONSTITUTIONAL ISSUE, THE AVOIDANCE CANON DOES NOT APPLY HERE.

Allowing litigants to secure favorable constructions of statutes by raising colorable, but not terribly persuasive, constitutional claims undermines democratic values.

See Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998). For that reason, construction of statutes to avoid a constitutional issue is only appropriate when, in the words of Justice Holmes, "grave doubts" arise about a statute's constitutionality. *See United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Judges properly invoke this canon only when they believe that "the alternative is a serious likelihood that the statute will be held unconstitutional." *Almendarez-Torres*, 523 U.S. at 238.[2] *See e.g. Jones v. United States*, 526 U.S. 227, 239-51 (1999) (extensively analyzing case law before concluding that a grave constitutional doubt exists). Even constitutional objections that have "some force" do not create "grave doubts" triggering application of the avoidance canon. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (constitutional claims about restrictions on abortion counseling).

This "grave doubt" limitation helps avoid creation of "statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres*, 523 U.S. at 237-38. Congress often lacks the practical ability to overrule erroneous judicial construction, given all of the matters pressing for its attention. *See* Richard Posner, *The Federal Courts: Crises and Reform* 285 (1985). So adherence to this limitation is necessary to avoid distorting elected representatives' policy choices. *See Almendarez-Torres*, 523 U.S. at 238.

No grave doubt (indeed no colorable claim) can exist about section 109's constitutionality. This Court has

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[2] This Court has never questioned *Almendarez-Torres'* treatment of the avoidance canon. *Cf. Apprendi v. New Jersey*, 120 S. Ct. 2348, 2360-63 (2000) (distinguishing *Almendarez-Torres'* constitutional holding).

repeatedly upheld delegations of authority pursuant to general principles much broader (and less determinate) than the standard governing the NAAQS.

B. CONSTRUCTION TO AVOID MERE NON-DELEGATION CLAIMS CAN UNDERMINE DEMOCRATIC VALUES BY AUTHORIZING UNGUIDED JUDICIAL RECONSTRUCTION OF NUMEROUS STATUTORY PROVISIONS.

The policy supporting the grave doubt requirement has special force in the non-delegation context. A practice of construing statutes to avoid mere claims of unconstitutional delegations would severely undermine democratic governance.

1. A LITIGANT CAN RAISE A NON-DELEGATION CLAIM UNDER ANY STATUTE DELEGATING AUTHORITY.

Since legislation almost always leaves some issues unresolved, litigants can raise non-delegation claims about almost every statute relying upon executive branch implementation. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 392-93 (1999) (Congress probably cannot anticipate all applications of a general policy). And, absent adherence to the precedent discussed above, raising such a claim could trigger unusual constructions of a statute.

In particular, if an issue about the intelligibility of the principle of protecting public health with an adequate margin of safety can trigger special construction, judicial reconstruction of statutes will become frequent indeed. A general statutory principle often fails to provide a "determinate criterion" that functions like an algorithm, dictating a precise result for each application of the statute. If

every problem that requires discretionary line-drawing without legislative "determinate criterion" presents an occasion for extraordinary construction, the judiciary, meaning every federal and state trial and appellate judge that interprets federal law, would have authority to reconfigure much of the United States Code. *Cf. Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 864-66 (1984) (democratic principles require that agencies, not courts, interpret ambiguities in statutes).

The avoidance canon does not now control most statutory construction, because the Constitution's specific provisions usually present problems in somewhat limited areas. For example, free speech claims may arise in libel[3], but arise seldom (if at all) in the environmental context, where the law limits pollution rather than communication. The non-delegation doctrine, by contrast, involves a general theory of legislation, so litigants can raise non-delegation claims about a wide variety of statutes.

2. SINCE MANY DIFFERENT CONSTRUCTIONS CAN CLARIFY A STATUTE, JUDGES' SELECTION OF SAVING CONSTRUCTIONS WILL REFLECT THEIR POLICY PREFERENCES.

Application of the avoidance canon in the non-delegation context will usually force judges to shape saving constructions reflecting their individual views of sound policy. Many different constructions serving many different values may clarify a statutory mandate. For example,

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[3] *See e.g. New York Times v. Sullivan*, 376 U.S. 254 (1964).

imagine a statute requiring EPA to write "sound environmental regulations." A judge could clarify this by requiring that costs not exceed benefits or that no individual suffer health impairment. The choice between these views (and other possibilities) would necessarily reflect a judicial policy preference.

In other cases, the first party to litigate a non-delegation issue will have an opportunity to secure its preferred saving construction. This explains why this case poses a question of whether to require consideration of cost, instead of whether to add specificity to section 109 by requiring, for example, that EPA protect against all health effects more likely than not to harm 100 or more people. *Cf. American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1038-39 (D.C. Cir. 1999).

UUnder other constitutional doctrines, the nature of the constitutional problem controls the policy direction of constructions avoiding constitutional questions. The avoidance canon tends to encourage free speech,[4] protect criminal defendants,[5] and limit regulation of churches,[6] because of the substantive content of the constitutional provisions underlying the constructions. Therefore, the substantive policies that the judicial constructions implement have roots in constitutional values, rather than judicial policy decisions lacking constitutional foundation.

This problem of frequent unprincipled reconstruction of statutes to avoid non-delegation issues has not

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[4] *See e.g. Int'l Ass'n of Machinists v. S. B. Street*, 367 U.S. 740, 749-50 (1961).

[5] *See e.g. Jones v. United States*, 526 U.S. 227, 239-40(1999).

[6] *See e.g. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (construing statute to avoid NLRB jurisdiction over church-operated schools).

bedeviled courts in the past because the non-delegation doctrine clearly permits Congress to delegate pursuant to general standards. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). This explains why only one of this Court's recent majority opinions has construed a statute to avoid a non-delegation claim. *See National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974). And that case arose in the tax area, where, according to Justice Douglas' majority opinion, a long tradition of non-delegation supports an inference that Congress does not intend to delegate its constitutional authority to tax at all. *See id.* at 340-41.

The plurality opinion in the *"Benzene"* case mentioned the non-delegation doctrine without explicitly invoking the avoidance canon, stating that the Occupational Safety and Health Act "might" offend the non-delegation doctrine absent the construction the plurality adopted. *See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion). A footnote in *Mistretta*, 488 U.S. at 373 n. 7, characterizes this statement as a use of the non-delegation doctrine to narrow a statute, but the *Benzene* plurality states that its resolution of the case "turns, to a large extent" on the analysis of two specific statutory subsections (which the opinion parses at length before briefly mentioning non-delegation). *"Benzene"*, 448 U.S. at 639. *Cf. American Trucking Ass'ns v. EPA*, 195 F.3d 4, 14 (D.C. Cir. 1999) (Judge Silberman dissenting) (characterizing *Benzene*'s reference to non-delegation as a "make-weight"). In any case, *Benzene* does not involve explicit consideration of the intelligible principle issue or a majority opinion on application of the avoidance canon. Any reinterpretation of the dormant non-delegation doctrine that brings the Act into doubt would encourage non-

delegation claims in conjunction with requests for novel statutory construction, rather than avoidance of constitutional questions.

C. CONSTRUING SECTION 109 TO INCLUDE COST CREATES A STATUTE FOREIGN TO WHAT THE ENACTING CONGRESS INTENDED.

The avoidance canon requires judges to limit themselves to constructions "not plainly contrary" to Congressional intent. *See Miller v. French*, 120 S. Ct. 2246, 2255 (2000) (declining to apply canon). This limit prevents judicial creation of statutes foreign to the enacting Congress' intentions. *Almendarez-Torres*, 523 U.S. at 238.

Yet Industry invokes the canon to transform a health protective statute into a cost-benefit statute. The enacting Congress clearly sought to overcome Industry resistance to cleaning up pollution by excluding cost considerations from the Act's goal setting provision. *See Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1149 (D.C. Cir. 1980). Industry seeks to incorporate selected teachings of the largely subsequent law and economics movement into the Act, but the Congress of 1970 was not among the pupils. Other briefs will discuss Congressional intent in detail.

D. INCLUDING COST EXACERBATES ANY CONSTITUTIONAL DIFFICULTY BY MAKING SECTION 109'S PRINCIPLE LESS INTELLIGIBLE.

The avoidance canon only authorizes constructions that avoid constitutional issues. *See United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). It does not authorize constructions that fail to resolve or exacerbate a constitutional problem.

If, however, section 109 creates grave constitutional doubts, construing it to require consideration of cost exacerbates the constitutional problem by making the Act's principle less intelligible than it is now. The Act now contains a policy of protecting the public from air pollution's ill effects. Adding cost considerations makes that policy less clear. It raises questions about whether EPA may allow a population of people to die or become ill from air pollution, a question that the current statute resolves clearly.

Requiring consideration of cost would introduce pervasive vagueness into section 109. A requirement to consider cost does not establish a policy about how cost factors should influence decisions. EPA may take cost into account by writing standards reflecting all economically feasible health protections. *See e.g. American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981). This approach involves assessment of industry's financial capacity for compliance expenditures, rather than a comparison between costs and benefits. *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 Ecology L. Q. 545, 609-10 (1997). Alternatively, Congress may require one of several possible relationships between costs and benefits. *See e.g. id.* 582-85 (benefits must exceed cost contrasted with benefits must equal cost); *Donovan*, 452 U.S. at 506 (reasonable relationship). So requiring EPA to consider cost hardly provides a more intelligible principle than the principle that EPA should protect public health from air pollution. Indeed, it establishes no principle at all; it just adds a factor.

III. INDUSTRY'S PROPOSED CLEAR STATEMENT RULE SUBVERTS DEMOCRATIC VALUES.

Industry urges the Court to adopt a clear statement rule requiring agencies to consider cost unless Congress specifically states that the agency may not consider cost. GE Br. at 18; ATA Br. at 45-46. Industry would require consideration of "risk-risk" tradeoffs as well. *See* GE Br. at 18. But no case or controversy exists over a "risk-risk" issue, as distinct from the cost issue. *See American Trucking*, 175 F.3d at 1051-53 (requiring EPA to consider the relationship between ground-level ozone and ultra-violet rays on remand). *Cf.* GE Br. at 2-3.

The proposed clear statement rule, if adopted, would subvert democratic values. It would make judges agents of statutory revision rather than honest interpreters of Congressional intent. *Cf. Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978) (we must put aside our views of the wisdom of Congressional action in reviewing a statute). It would therefore undermine Congressional control of policy.

A. INDUSTRY'S CLEAR STATEMENT RULE MAKES ADMINISTRATIVE AGENCIES MORE LIKE LEGISLATURES.

Presumptively requiring agencies to weigh all of the pros and cons of their actions makes them more similar to special purpose legislatures. *See generally* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 Ecology L. Q. 545, 605-13 (1997). Weighing all of the pros and cons of a policy choice is the quintessential legislative activity. *See generally Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) ("it is for the legislature . . . to balance the advantages and disadvantages of the new requirement."). Having

weighed the pros and cons, Congress decided to have EPA execute a rather specific policy, a policy of protecting public health and welfare from air pollution. *See* 42 U.S.C. § 7409. *Cf. American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981) (Congress chose a balance between costs and benefit in favoring worker health). Industry's proposal to presumptively require agencies to employ a legislative ethos broadening the range of potential outcomes, rather than criteria reflecting specific Congressional policy choices, conflicts with its call for more "determinate" statutory criteria.

B. INDUSTRY'S CLEAR STATEMENT RULE CONFLICTS WITH PRECEDENT DESIGNED TO ASSURE THAT AGENCIES AND COURTS RESPECT LEGISLATIVE POLICY DECISIONS.

The major purpose of judicial review of agency action has been to ensure that agencies carry out Congressional mandates. The Industry clear statement rule seeks instead to use judicial review as a means of revising statutes to make them conform to Industry's view of sound risk management legislation. *See* AP Br. at 4; GE Br. at 1.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), reveals that this Court created "hard look" judicial review precisely to ensure that agencies focus exclusively on factors relevant to implementing specific Congressional policy decisions, rather than engage in open-ended cost-benefit balancing. This Court interpreted the APA to require reviewing courts to consider "whether the decision was based on consideration of the relevant factors and whether there has been a clear error in judgment." *Overton Park*, 401 U.S. at 416. The Court used the term "relevant factors" to refer to the factors the

governing statute explicitly makes relevant, not all factors that might be considered relevant if the agency were a legislature. In particular, the Court interpreted a mandate barring construction of federally funded highways through parkland "unless there is no feasible and prudent alternative . . . " *Id.* at 411. The Court rejected the government's argument that this provision authorizes "a wide-ranging balancing of competing interests." *See id.* at 411-12. The Court held that the Secretary of Transportation could only permit destruction of parkland if "he finds that alternative routes present unique problems." *Id.* at 413. This Court remanded so that the District Court could ascertain whether the Secretary undertook the limited inquiry the statute required, or violated the statute by engaging in "wide-ranging balancing." *See id.* at 413, 415-16, 420.

In case after case, this Court focuses not on the question of what factors can be relevant to a decision in an abstract sense (weighing pros and cons), but on what factors the statute commands the agency to consider in order to carry out a prior Congressional policy. Thus, in *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976), the Court rejected claims that EPA may consider cost and feasibility in deciding whether to approve a state implementation plan, the package of regulations states write to generate the emission reductions needed to meet the NAAQS, *see Train v. Natural Resources Defense Council*, 421 U.S. 60, 65-67 (1975). The Act listed factors that EPA must take into account in reviewing state plans. *See Union Electric*, 427 U.S. at 257. The Act did not list cost and feasibility. *Id.* This Court held that the Administrator cannot consider cost and feasibility unless these factors can be found among the "eight criteria" listed. *Id.* The Court analyzed the issue of whether cost and feasibility

can be found, not by reference to any presumptive policy preference, but by parsing the language and legislative history of the Act. *See id.* at 257-65 (parsing the Act and concluding that Congress had decided to force pollution sources to develop control devices that might appear "economically or technically infeasible").

Similarly, in *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981), this Court rejected an argument that the Occupational, Safety and Health Administration must conduct CBA. Since the governing statute explicitly required a determination of feasibility, i.e. what is capable of being done, the Court declined to require a reasonable relationship between costs and benefits. *Id.* at 506-09. CBA is not required, said the Court, because feasibility analysis is. *Id.* at 509.

Donovan rejects the notion that costs are balanced against benefits absent a contrary statement. *Donovan* states that "Congress uses specific language" when it intends that "an agency engage in cost-benefit analysis." *Id.* at 510-11. The Court justifies this statement by citing statutory provisions that expressly say that Congress wants costs and benefits weighed against each other, provisions unlike section 109 or the statutory provision before the *Donovan* Court. *Id.* at 510. This lack of a statement requiring CBA supported the Court's holding that Congress meant to require none. *See id.* at 510-12. Similarly here, section 109 does not mention cost at all, so it does not include it. *See Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980) (Congress expressly directs EPA to consider costs when it intends them to be considered). Hence, Congress intends to focus agencies exclusively on the criteria it writes to guide their decisions. *See e.g. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 34, 46-48 (1983) (failure to

consider availability of airbags makes recission of rule requiring passive restraints arbitrary and capricious under a statutory "mandate . . . to achieve . . . safety").

All of these cases reject judicial broadening of narrowly focused statutes. Rather, this Court construes statutes with the goal of confining the agency to the factors Congress expressly lists, since Congress makes policy choices by selecting limited criteria to govern agency decisions. Industry's proposal conflicts with this precedent by presumptively adding a factor in order to change policy.

C. THE CONSTITUTION DOES NOT AUTHORIZE JUDGES TO ENACT THEIR VIEWS OF SOUND RISK MANAGEMENT INTO LAW.

Although federal courts have no general law making power, *see Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), Industry asks this Court to establish a broad risk management principle requiring consideration of cost in all regulatory settings, *see* GE Br. at 1. Congress rather than the judiciary chooses the principles governing pollution control. The judiciary should limit itself to assessing Congressional intent without the use of a clear statement rule biasing that assessment toward Industry's view of desirable policy.

1. CLEAR STATEMENT RULES GENERALLY REQUIRE A QUASI-CONSTITUTIONAL FOUNDATION.

Clear statement rules serve to protect only "weighty and constant" values, often derived from constitutional structure. *See Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). *See e.g. Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (rule discourages interference with

state sovereign powers under our constitutional scheme). *See generally* William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992). Industry does not identify any constitutional foundation for its clear statement rule.

Constitutional values often justify the risk of judicial distortion of Congressional policy choices that adherence to a clear statement rule entails. For a clear statement rule sometimes may lead to constructions that stray from the most natural contextually appropriate meaning of statutory language. *See e.g. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504-06 (1979) (holding that the NLRB lacks jurisdiction over teachers at religious schools without examining broad statutory language defining employer and employee); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 262-63 (1991) (dissenting opinion) (clear statement rules compel selection of "less plausible" constructions and exclude extrinsic aids to interpretation); *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994) (recognizing that Congress superseded *EEOC v. Arabian Am. Oil Co.'s* holding). Industry cannot and does not argue that protecting public health from air pollution without considering cost is irrational as a matter of "substantive" due process. *See* GE Br. at 18 n. 37. The protection of public health through air quality standards is obviously related to a legitimate public purpose. *See Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955). Nevertheless, Industry invites this Court to revise section 109 based on its views of the reasonableness of the health protection principle. *See* ATA Br. at 25; GE Br. at 4-12.

2. JUDICIAL REVIEW OF LEGISLATION'S REASONABLENESS SHOULD NOT GUIDE STATUTORY INTERPRETATION.

This Court should reject Industry's invitation to base a canon of construction (or any statutory interpretation) on its assessment of the wisdom of a legislative principle, such as the principle of protecting the public from air pollution's ill effects. The Court's proper role in interpreting statutes is to determine Congressional intent. *See Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.). If federal and state judges develop substantive canons derived from their assessment of the reasonableness of legislation, the canons and the interpretations they lead to will necessarily reflect judges' views of sound policy.

Policy arguments that Congress regularly considers, such as arguments about cost considerations, form an inappropriate basis for a clear statement rule. *See Almendarez-Torres*, 523 U.S. at 267 (dissenting opinion) (we presume that Congress agreed with traditional practice or common law, not "our current policy judgments"). A clear statement rule ensures that the legislature faces a constitutional issue that it may otherwise neglect. *See Gregory*, 501 U.S. at 461 ("clear statement" rule "assures that legislature has faced" the federalism issue) [citations omitted]. Since Congress considers cost issues central to environmental law, a clear statement rule on this subject does not force a confrontation with a neglected constitutional value; rather, it distorts Congressional choices about contemporary policy issues.

This Court has rejected searching judicial review of the reasonableness of economic legislation precisely because judges tend to enact their economic and social

views into law when making rulings based on an assessment of reasonableness. *See Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (repudiating unreasonableness test for substantive due process, because it leads judges to "strike down laws" thought "unwise or incompatible with some particular economic or social philosophy."). The *Lochner* Court framed the constitutional question economic legislation raised as whether the legislation was "an unreasonable, unnecessary, and arbitrary" interference with personal liberty or a "reasonable . . . exercise of the police power." *Lochner v. New York*, 198 U.S. 45, 56 (1905). The Court reached a conclusion that a law limiting bakers to a ten hour work day is arbitrary by adopting reasoning very much like that which Industry invites this Court to apply in the case at bar. The Court speculated that the law "might" prove counterproductive in terms of its own objectives. *Compare id.* at 59 (limits on hours of employment "might seriously cripple the ability of the laborer to support . . . his family.") *with* GE Br. at 10 (pollution control costs "could" increase asthma). And the *Lochner*-era Court frequently used difficulties in justifying precise line drawing to question the rationality of economic legislation. *Compare Lochner*, 198 U.S. at 62 (calling conclusion that 10 hours of work does not endanger health, but 10 and a half hours does "entirely arbitrary"); *Adkins v. Children's Hospital*, 261 U.S. 525, 556-57 (1923), *overruled*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (board "probably found it impossible to follow the indefinite standard of the statute" authorizing a minimum wage for women, "and brought . . . different factors into the problem") *with* GE Br. at 17-18 (because scientific information cannot "definitively determine" a precise air quality standard, implementing a health criterion is impossible and EPA considers cost factors). Finally, that

Court often treated a failure to weigh all pros and cons as unreasonable. *See Adkins*, 261 U.S. at 557 (failure to consider cost to employer of providing a minimum wage). *Contra Parrish*, 300 U.S. at 397 (rejecting this approach).

Justice Brandeis warned of the danger of enacting judicial "prejudices into legal principles" through review of social and economic legislation under the "arbitrary" and "capricious" standard of substantive due process. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J. dissenting). This Court ultimately concluded that it should abandon the kind of evaluation of legislative reasonableness that Industry seeks, because it had led to the creation of legal principles based on judges' economic and social views. *See Ferguson*, 372 U.S. at 729-30; *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955).

For the same reason, this Court should reject judicial assessment of the reasonableness of a legislative principle as the basis for a clear statement rule. Such an approach will invite the creation of clear statement rules erecting the views of state and federal judges into legal principles governing statutory "construction". Clear statement rules should have roots in constitutional substance, not the contemporary policy preferences of unelected judges.

3. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT JUSTIFY A NEW SUBSTANTIVE CANON.

Since the constitution does not authorize judicial revision of statutes based on rationality review, *see United States v. Rutherford*, 442 U.S. 544, 555 (1979) (federal judges may not "rewrite legislation in accord with their own conceptions of prudent public policy."), Industry

invokes the APA as a quasi-constitutional justification for extraordinary judicial construction. General Electric, for example, asks this Court to hold that agency action under a regulatory statute "is not reasoned unless the agency considers" compliance costs (and risk tradeoffs), invoking the APA's arbitrary and capricious standard. GE Br. at 1-2, 4, 12. It then asks the Court to construe "[a]cts of Congress" in light of this abstract judicial assessment of reasonableness. *Id.* at 12.

A holding that a particular agency action is unreasoned under the APA and parallel provisions, i.e. arbitrary or capricious, could never justify a statutory construction, it would simply justify a remand to the agency. *See* 5 U.S.C. § 706(2) (only authorizing courts to "hold unlawful and set aside" agency action found arbitrary and capricious); 42 U.S.C. § 7607(d)(9) (only authorizing reversal of such action). If section 109 precludes cost consideration, then EPA consideration of cost would be arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider."). So EPA's failure to consider cost can be arbitrary and capricious only if one assumes what Industry is trying to prove, that section 109 requires consideration of cost. *Cf. Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (EPA's failure to consider river's degraded state not arbitrary and capricious, because that status is not an important factor under a correct reading of the law); *Natural Resources Defense Council (NRDC) v. Administrator*, 902 F.2d 962, 978 (D.C. Cir. 1990) (petitioner's "real dispute is not with EPA but with Congress").

Industry cannot secure review of its abstract claim that all agency action not considering cost is unreasoned

under the APA, *see* GE Br. at 1, because the Court does not have before it all of the reasons that government agencies have supplied or might supply in the future to justify their actions. This claim requires review of prior D.C. Circuit holdings that EPA has provided satisfactory explanations for several NAAQS without considering cost. *See NRDC*, 902 F.2d at 968-74; *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1183-87 (D.C. Cir. 1981); *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1156-67 (D.C. Cir. 1980). These holdings show that Industry's claim that setting health-based standards without considering cost is impossible is simply wrong. *Cf.* GE Br. at 17. But the relevant records are not before the Court, and the APA only authorizes on the record review. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). And Industry's argument requires an inappropriate hypothetical assessment of reasoning that agencies have not yet provided, since the argument encompasses an abstract claim that all future actions will be unreasoned. *Cf. Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163 (1967) (declining to adjudicate claim that agency cannot inspect plants without knowing agency reasons for inspecting a particular plant).

Industry questions the reasonableness of the legislature requiring an agency to protect health without considering cost, while framing its request for a new canon of construction as a mere application of the APA. It goes far beyond the record that would form the basis for APA review, *see Overton Park*, 401 U.S. at 419, and deploys the full range of policy arguments it uses before Congress to question the wisdom of the health protection principle. Industry's claim that all possible applications of the principle that health should be protected regardless of cost are unreasonable is tantamount to claiming that the

health protection principle itself is unreasonable. *Cf. Secretary of Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5 (1982) (equating a claim that law is incapable of valid application with a claim that law itself is invalid); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (allegation that ordinance advances no legitimate state interest no matter how applied states a facial claim about the law itself). The APA simply does not authorize presumptive judicial legislation based on judges' views of the reasonableness of existing law. *Cf.* S. 981 § 627(d), 105th Cong. (1998) (rejected bill that might have generally authorized courts to set aside agency action that did not take cost into account).

D. ADDING COST CONSIDERATIONS TO SECTION 109 WILL CHANGE POLICY, NOT IMPROVE EPA'S REASONING.

General Electric states that "neither science nor health considerations alone can *definitively* determine" the level of a standard. *See* GE Br. at 17 [emphasis added]. But combining cost considerations with health considerations will not "definitively determine" the level of a standard either. In either case, EPA will have to make some judgment in interpreting complicated and often incomplete scientific evidence. *Cf. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103-06 (1983) (court must be "at its most deferential" in evaluating agency actions involving scientific determinations). If costs are added EPA must make further judgments that are even harder to rationalize.

In order to compare costs and benefits, EPA would have to make numerous policy choices in deciding how much weight to give the benefits. In order to estimate the numbers of deaths and illnesses a proposed standard

would avert, EPA would have to make judgments about how to deal with data gaps. *See* Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Assessment*, 92 Colum. L. Rev. 562, 572 (1992) (National Academy of Sciences has identified almost fifty decisional points in risk assessment). It would have to, in other words, judge the adequacy of a margin of safety in extrapolating seemingly precise damage estimates from incomplete data. EPA would then have to decide how much weight to give the benefits it identified. These kinds of policy choices, not the science or cost data, would determine the standards.

Its choice of valuation methodology would become extremely important, involving EPA in a whole new set of judgments that would be difficult to defend rationally. Suppose that EPA decides to value health benefits by estimating how much a polluter would have to pay a pollution victim to accept a predicted illness or death. A pollution victim might well refuse to accept even a trillion dollars to accept the pollution that will cause her demise. *See* E.J. Mishan, *Cost-Benefit Analysis* 171 (1982). Hence, this willingness to accept methodology coupled with a strong perfect information assumption might lead the regulator to prohibit any pollution predicted to kill people or cause serious illness.

The regulator might, on the other hand, ask how much the victim would be willing to pay to abate pollution. *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 Ecology L. Q. 545, 589-90 (1997). This would generate very different results, especially if the regulator assumed that the victim does not know that she herself will die or experience illness. *See id.* at 588-591; Mishan, *supra* at 171 (wealth limits price a person will pay for a

good, but price a person may demand to forego a good "can be infinite"). Indeed, even if one treated the core methodology as a given, numerous policy judgments would still come into play in applying the methodology. The raw scientific and cost information would not determine a standard. Adding cost to section 109 changes legislative policy, but it makes reasoned decision-making under the APA harder, not easier.

E. THE COURT SHOULD NOT CREATE A LEGAL RULE REFLECTING AN ECONOMIC THEORY LACKING CONSTITUTIONAL FOUNDATION.

In his *Lochner* dissent, Justice Holmes chided the Court for deciding the case "upon an economic theory which a large part of the country does not entertain," *see Lochner*, 198 U.S. at 75, although laissez-faire theory enjoyed a strong following among the lawyers of his day. *See* William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937*, 82-83 (1998).

Industry urges this Court to follow a practice that discredited the *Lochner*-era Court, allowing a contemporary economic theory to heavily influence the creation of general legal principles lacking constitutional foundation. Industry's clear statement rule's push toward CBA, *see e.g.* ATA Br. at 30, reflects neoclassical economic theory. That theory defines optimal public policy as the product of an economic analysis of costs and benefits, *see e.g.* Mishan, *supra* at 141-48, thus supporting the view that CBA should precede all important public policy decisions.

Many voters may not subscribe to neoclassical economic theory, especially as applied to the setting of environmental goals. A very common-view holds that pollution causing death or serious illness should simply cease, regardless of cost. *See e.g. Review of EPA's Proposed Ozone and Particulate Matter NAAQS Revisions-Part 2 Before the Subcomm. on Health and Env't. and the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 48, 49 (1997) (statement of Richard L. Brodsky, Chairman, New York State Assembly Committee on Environmental Conservation) (calling a cost-benefit approach to human health protection "morally repugnant").

This view has deep roots in the common law maxim *sic utere tuo ut alienum non laedas* (roughly, do no harm), which often implied regular imposition of strict liability. *See* III William Blackstone, *Commentaries on the Laws of England* 217 (Dawsons of Pall Mall ed. 1966); Morton J. Horowitz, *The Transformation of American Law* 1780-1860 32 (1977). While some courts relaxed the strict approach in subsequent years, many 19th and early 20th century courts repudiated balancing of equities and ordered plants to abate their pollution or shut down. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-39 (1907) (Holmes J.) (allowing "possible [economic] disaster" because the petitioning State "has the last word as to whether . . . its inhabitants shall breathe pure air"); *Seacord v. The People*, 13 N.E. 194, 200-01 (Ill. 1887) (rule against balancing conveniences is well settled); *Bowman v. Humphrey*, 100 N.W. 854, 855 (Iowa 1904) (evidence that a defendant's business provides "great benefit and profit to the . . . public" held inadmissable); *Whalen v. Union Bag & Paper Co.*, 101 N.E. 805, 806 (N.Y. 1913) (enjoining operation of a pulp mill even though abatement may cost far more than

the damage inflicted); *Sullivan v. Jones & Laughlin Steel Co.*, 57 A. 1065, 1071 (Pa. 1904) (enjoining coal dust emissions and declining to balance conveniences); *Susquehanna Fertilizer Co. v. Malone*, 20 A. 900, 902 (Md. 1890) (rejecting "reasonable use" limitation and CBA when damage is non-trivial). *Cf. Boomer v. Atlantic Cement Co.*, 257 N.E. 2d 870, 871-73, 875 (N.Y. 1970) (explaining that New York's settled rule requires automatic injunction of a continuing nuisance, but choosing to abandon this rule in light of need for public regulation).

Contemporary critics of CBA object to it on both practical and normative grounds. Many critics believe that bureaucrats ought not and cannot attach a monetary value to human life. *See* Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 Tex. L. Rev. 1243, 1294-95 (1987). *See also* Mark Sagoff, *The Economy of the Earth* 26-29 (1988) (public policy should reflect qualitative value choices rather than summation of preferences). And critics claim that, in practice, a weighing of costs and benefits will give short shrift to environmental and public health considerations that cannot be easily quantified. *See e. g.* Thomas O. McGarity, *A Cost-Benefit State*, 50 Admin. L. Rev. 7, 11 (1998) (CBA will "invariably" reduce statutes' environmental protection); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex. L. Rev. 525, 541-49 (1997) (explaining how a cost-benefit requirement and hard look judicial review ended regulation under section 6 of the Toxic Substances Control Act).

To be sure, a requirement to consider cost does not specify how it should be considered, and therefore does not mandate full compliance with the theory of optimal pollution. But the *Lochner*-era Court did not consistently and fully adopt laissez-faire theory either. William M.

Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937*, 7 (1998). Rather, the Court's decisions reflected the influence of laissez-faire views and contemporary elite distaste for labor laws. *See id.* at 9-10, 86, 140-43, 159-61, 178. This was enough to earn it a reputation as unprincipled and ideological. *See id.* at 142-43, 160-61, 178, 201. Industry's proposed statutory canon similarly reflects deep antipathy toward environmental law and the embrace of an economic theory.

Typically, discussions of the *Lochner*-era address constitutional rulings, the specific focus of Holmes' *Lochner* dissent. But, the Court's statutory interpretation reflected its laissez-faire like views as well. *Lochner* itself held that a statute requiring a sixty-hour work week for bakers violated "liberty of contract" and thus the due process clause of the Fourteenth Amendment. 198 U.S. at 46 n. 1, 53, 64. The Court also tended to view labor actions as "coercive" interference with rights protected by due process and construed anti-trust laws to authorize injunction of strikes and boycotts. *See e.g. Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465-66, 478-79 (1921) (boycott coercively interferes with a "property right"); *American Steel Foundries v. Tri-Cities Cent. Trades Council*, 257 U.S. 184, 202, 205 (1921) (picketers coercively interfere with a property right). *Cf. United States v. E.C. Knight Co.*, 156 U.S. 1, 9, 16-18 (1895) (anti-trust laws do not regulate sugar monopoly). The *Lochner*-era Court's adoption of statutory interpretation reflecting its anti-labor laissez-faire policy views contributed to that Court's poor reputation as an ideological court. *See Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products*, 311 U.S. 91, 102-03 (1940) (discussing Congressional findings of "abuses of judicial power" and misinterpretation of anti-trust law). This Court repudiated these labor injunction cases in 1940, just

as it repudiated much of the *Lochner*-era's constitutional legacy. *See id.*

Industry's arguments invite this Court to emulate the *Lochner*-era vice of treating a policy running afoul of an economic theory as irrational. This Court should decline the invitation and leave Congress the task of deciding whether to conform existing law to a contemporary economic theory.

CONCLUSION

We ask the Court to affirm the Court of Appeals ruling confirming that EPA may not consider cost in writing the NAAQS.

Respectfully submitted,

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In the

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*;
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* THE STATE OF NORTH CAROLINA IN SUPPORT OF CROSS-RESPONDENTS

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Cross-Respondents.

BRIEF OF *AMICUS CURIAE* THE STATE OF NORTH CAROLINA IN SUPPORT OF CROSS-RESPONDENTS

The State of North Carolina, as *amicus curiae*, respectfully submits this brief in support of the Cross-Respondent, Carol M. Browner, Administrator of the United States Environmental Protection Agency ("EPA"). North Carolina urges reversal of the decision of the court below, *American Trucking Ass'ns, Inc. ("ATA") v. United States Envtl. Protection Agency*, 175 F.3d 1027, *reh'g granted in part and reh'g en banc denied*, 195 F.3d 4 (CADC 1999), to allow EPA to enforce its revised primary National Ambient Air Quality Standard ("NAAQS") for ozone ("the eight hour standard") which requires states to reduce ambient levels of ozone to 0.08 parts per million ("ppm"). National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 C.F.R. Part 50).

INTEREST OF THE *AMICUS*

A. THE STATE PLAYS A PRIMARY ROLE IN THE PROTECTION OF ITS NATURAL RESOURCES AND THE HEALTH OF ITS CITIZENS

Every state retains a quasi-sovereign interest in its natural resources, including the air within its borders. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S. Ct. 618, 619, 51 L. Ed. 1038 (1907). Thus, a state may regulate activities that threaten to degrade its air quality to such a level that the health and welfare of its citizens are negatively affected. Although there now exists in the Clean Air Act a federal mandate to the states to maintain minimum levels of air quality, the Act retains, through the use of State Implementation Plans ("SIPs"), the states' pre-eminent role in air pollution abatement. *Hancock v. Train*, 426 U.S. 167, 169-70, 96 S. Ct. 2006, 2008, 48 L. Ed. 2d 555 (1976). The Clean Air Act itself recognizes that "air pollution control at its source is the primary responsibility of States and local governments...." 42 U.S.C. § 7401(a)(3).

The police power provides the state with authority to regulate for the protection of the health and welfare of its citizens. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442, 80 S. Ct. 813, 815, 4 L. Ed. 2d 852 (1960) (police power encompasses regulation of air pollution). With regard to those members of society that require special consideration, such as the mentally and physically impaired, the interest of the state is heightened. "That the State has a proper interest in providing care and assistance to the unfortunate goes without saying." *O'Connor v. Donaldson*,

422 U.S. 563, 575, 95 S. Ct. 2486, 2493, 45 L. Ed. 2d 396 (1975).

North Carolina is acutely aware of its responsibilities regarding air quality and public health. Due in part to its explosive growth over the past two decades, the State currently faces vexing ozone pollution problems that endanger the health of its sensitive citizens in urban areas across the State, and threaten some of its most valuable natural resources. For example, in 1999, the State experienced 68 days of unhealthy ozone levels -- the fifth highest total in the country. *See* N.C. Div. of Air Quality, *Eight-Hour Ozone Averages in NC in 1999*, at 29 (1999). In 1998, six of the State's urban areas experienced at least ten exceedances of the eight hour standard at issue in this case. Memorandum from A. Dennis McBride, State Health Director, to Bill Holman, N.C. Sec'y of Envt. & Natural Resources, at 1 (Aug. 10, 2000)

North Carolina's State Health Director recently reported that during the 1997 high ozone season elevated ozone levels caused up to 4.6% (1,900 incidents) of the total respiratory related hospital admissions in the State. This represents more than twice the percentage (2.12%) attributed to ozone over the same period in the thirty-seven eastern states. Estimates of the cost of treating just these ozone-related hospital admissions range from $9,000,000 to $19,000,000. Further, high ozone levels were linked to 5,700 emergency room visits, and 240,000 asthma attacks in North Carolina during the ozone season. *Id.* at 1-2; *see also* Memorandum from Luanne K. Williams *et al.*, N.C. Dept. of Health & Human Services, to Alan Klimek, N.C. Div. of Air Quality (Jan. 11, 2000).

To alleviate these health problems and in furtherance of its role as protector of its sovereign resources, the State of North Carolina has adopted regulations to begin voluntarily implementing the eight hour ozone standard that is before this Court. *See* 15A N.C.A.C. § 2D.0405.

B. The State Has A Particular Interest In The Protection Of The Health Of Children In The State

Historically, the state has played an important role in the protection of one of its most valuable assets -- children. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 113, 115 S. Ct. 2038, 2061, 132 L. Ed. 2d 63 (1995) (O'Connor, J., concurring) (noting states' historical sovereignty and "claim by right of history and expertise" in field of education). No state has taken this role more seriously in recent years than North Carolina. The *amicus* submits that it vigorously safeguards the health of the children of its citizens and has a substantial interest in reducing ozone pollution in order to protect this particularly sensitive segment of the population.

Under the state's obligation as *parens patriae*, it seeks to protect the health and welfare of minors when the minor's parents or guardian are unable to adequately perform that task. *E.g., Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (upholding involuntary termination of parental rights at request of North Carolina locality); *see also Troxel v. Granville*, 120 S. Ct. 2054, 2072, 147 L. Ed. 2d 49 (2000) (Stevens, J., dissenting) (noting, with regard to children, states' "long-recognized interests as *parens patriae*"). In furtherance of and to

complement this role, the *amicus* regulates schools, day care centers, and foster homes to assist parents in the upbringing of children. In particular, education is of the highest priority in North Carolina, and regular attendance is critical to a child's success in school. Individual school boards maintain some flexibility over the school calendar, but the State requires each public school to provide 180 days and 1,000 hours of instruction for enrolled children. N.C.G.S. § 115C-84.2. Attendance is mandatory. *Id.* § 115C-378. Although nonattendance for health reasons is considered an excusable absence, repeated absence for any reason is detrimental to any child's academic and social development. The State plainly cannot mandate attendance in school yet sit idly by while avoidable health problems, such as those attributable to high concentrations of ground-level ozone, lead to absenteeism.

Children must also be afforded the rich outdoor experiences that are vital to a child's development. Although the State allows for local control over the physical layout of elementary and secondary schools, the Department of Public Instruction provides detailed guidelines for the selection of sites for such schools and the planning of school facilities. These guidelines recommend that the usable area of any school grounds be large enough to accommodate outdoor instruction and recreation, and provide very specific guidance regarding the improvement of outdoor areas for these important purposes. *See* N.C. Dept. of Public Instruction *et al.*, *Land for Learning* (June 1998).

The State is even more insistent that children are afforded ample opportunity for outdoor experience at facilities that it

regulates directly. The State requires licensed day care facilities to reserve a certain area for outdoor activities and to allow each child the opportunity for outdoor activity. N.C.G.S. § 110-91; 10 N.C.A.C. §§ 3U.0509, .0511, .0601, .1402, .2504, .2508. The State further mandates provision of outdoor activity space by developmental day services for children with or at risk for developmental challenges, foster homes, and residential child care facilities. 10 N.C.A.C. §§ 14V.2204, .2404, 41F.0703, 41S.0609.

North Carolina, having aggressively exercised its regulatory obligation to protect the physical and mental health of the children of its citizens, retains a significant interest in the abatement of ground-level ozone pollution, particularly as it impacts children.

SUMMARY OF ARGUMENT

The expansive record produced by EPA in this case clearly supports EPA's decision to revise the ozone NAAQS. Current data show that tropospheric ozone at any level has adverse health effects. Therefore, EPA has revised the averaging period from one to eight hours to provide a more comprehensive standard. The concentration level has been lowered from 0.12 ppm to 0.08 ppm to reduce the incidence of adverse health effects. EPA updated the measurement of the NAAQS to a concentration-based form to take into consideration the magnitude and not just the number of violations of the ambient standard. These amendments to the NAAQS will result in significant and necessary improvements in the physical health of children, other sensitive populations, and the general population.

The benefits to youths are of special concern to the State because illnesses to children may result in developmental setbacks. For example, increased ground-level ozone may force a child to miss school more often. In addition, ozone-related health problems may deter a child from outdoor activities that present significant opportunities for social and physical development.

To realize these health benefits, the eight hour standard established by EPA must be enforced nationwide. Any state may, as North Carolina intends, implement the eight hour standard under state law. But increased costs to industry and consumers attend such a program, creating an economic disadvantage for states implementing the more protective standard. Also, the migratory nature of air pollutants places at risk any state's efforts to attain the standard. Ozone precursors imported from other states can overwhelm local efforts to curtail ozone pollution, such as may be occurring in the western North Carolina section of the Great Smoky Mountains National Park.

ARGUMENT

The *amicus* supports and endorses the views expressed by its sister states presented in *amicus curiae* briefs by New York *et al.* in the companion case, *Browner v. ATA*, No. 99-1257, and by California *et al.* in this case. North Carolina writes separately to bring to the Court's attention the health benefits of the eight hour standard and the need for a national standard to achieve these benefits.

This brief will focus in large measure on the adverse impacts of tropospheric ozone on children's health. The *amicus* does not intend to imply that this is the only group that will benefit from the eight hour standard. Indeed, the entire population will face fewer health risks under the more stringent standard. *E.g.*, 62 Fed. Reg. at 38,864/3 (suggesting that reductions in hospital admissions for respiratory causes will occur as the ambient ozone concentration level is reduced). Asthmatics will gain particularly, *e.g.*, *id.* at 38,864/2 (exposure to ozone may exacerbate asthma), as may the elderly and those who work or exercise regularly outdoors. The attention given children herein is merely to illustrate the impacts of ground-level ozone on one sensitive population.

I. THE EIGHT HOUR STANDARD IS REQUIRED TO BEST PROTECT THE PHYSICAL HEALTH OF CHILDREN

EPA's data show that ground-level, or tropospheric, ozone is a "non-threshold" pollutant, because no minimum level of ozone has been identified under which health effects become negligible. Simply put, the less ozone humans inhale, the less often adverse health impacts will occur and the less severe those impacts will be. *See ATA*, 125 F.3d at 1034. The question thus becomes, at what ozone standard does the health risk become acceptable? *See* 62 Fed. Reg. at 38,863/3.

The revised ozone NAAQS consists of three elements: the averaging period (eight hours), the ambient concentration level (0.08 ppm) and the form (fourth highest measurement over averaging period not to exceed level). EPA studied each element exhaustively and selected an appropriate standard from

a limited range of options. The *amicus* supports EPA's selection of the eight hour standard as a legally permissible implementation of the Clean Air Act. This significant improvement in air quality is a necessary step in the evolution of the safeguarding of juvenile health in the face of scientific uncertainty.

The eight hour averaging time better protects the health of children than the one hour averaging time under the current ozone NAAQS. First, the eight hour averaging standard is more comprehensive, as it acts to suppress ozone levels over a longer period of time. The Clean Air Scientific Advisory Council ("CASAC") plainly concluded that the "8-hour standard [is] more appropriate for a human health-based standard than a 1-hour standard." 62 Fed. Reg. at 38,861/3. Second, scientific evidence that was not available when EPA last reviewed the ozone NAAQS now demonstrates that adverse health consequences occur at ozone concentrations lower than the current 0.12 ppm standard when that concentration is experienced over an eight hour period. *Id.* at 38,861/2.

The *amicus* further submits that the EPA's selection of a concentration level of 0.08 ppm was appropriate. Although evidence now supports the existence of adverse health effects at levels below the current 0.12 ppm standard, a level of 0.09 ppm coupled with an eight hour averaging period represents a marginal if any improvement over the current standard. *Id.* at 38,864/2. Implementation of a 0.08 ppm ozone level would eliminate hundreds of thousands of occurrences in children of

adverse ozone reactions in EPA's limited study area alone.[1] *Id.* at 38,864/3. EPA would be abdicating its duty to "protect the public health," 42 U.S.C. § 7409(b)(1), if it simply ignored this data rather than promulgating at least the incremental improvement represented by the eight hour standard.

Estimates of average naturally occurring background levels of ozone range from 0.02 ppm to 0.05 ppm. U.S. Envtl. Protection Agency, *Air Quality Criteria for Ozone and Related Photochemical Oxidants*, at § 1.4 (1996). A concentration level of 0.07 ppm measured over eight hours approaches the levels that occur naturally, albeit infrequently, in some areas. 62 Fed. Reg. at 38,868/3. Thus, there is no merit to the argument that in order to protect the public health, EPA must set the NAAQS for a non-threshold pollutant at zero. *See ATA*, 175 F.3d at 1034. Such a standard implies that Congress intended that naturally occurring tropospheric ozone be cleansed entirely from the air, which is absurd.

The third and final element of the NAAQS is the "form." "Taken together, the level and form of the standard, for a given averaging time, determine the degree of public health protection afforded by the standard." 62 Fed. Reg. at 38,863/2. The current one hour standard uses an exceedance-based form, under which attainment is measured by the number of days on which ozone levels exceed the ambient standard. The concentration-based form that EPA seeks to adopt assesses

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[1] The EPA's study area included nine urban areas in which approximately 3.1 million "outdoor children" lived. 62 Fed. Reg. at 38,865/2 n.15

compliance by averaging each of the annual fourth highest ozone concentration levels for three consecutive years. Unlike the exceedance-based form, the concentration-based form more appropriately considers the magnitude of each violation, and not just the number of violations. EPA found that the concentration-based form also provides greater stability from year to year. *Id.* at 38,869/2-3.

The *amicus* agrees with EPA that the impacts to children under the one hour standard are substantial and should be reduced. In supporting adoption of the eight hour standard, the North Carolina State Health Director concluded, as did CASAC, that the one hour standard provided little or no margin of public safety, especially for sensitive populations, such as children. Memorandum from McBride, *supra*, at 2; 62 Fed. Reg. at 38,863/3; *see also* 42 U.S.C. § 7409(b)(1) (requiring NAAQS to be established to allow "an adequate margin of safety").

II. GROUND-LEVEL OZONE IS DETRIMENTAL TO CHILD DEVELOPMENT

"Outdoor children" are at particular risk from the effects of ground-level ozone. This population includes children between the ages of six and eighteen years of age who are active outdoors, and represents thirty to forty-five percent of the entire population of children. 62 Fed. Reg. at 38,860/3 n.7. "Outdoor children" with asthma are at an even greater risk.

Even at the 0.08 ppm standard, just under one in every one hundred outdoor children will experience moderate to severe pain when breathing deeply at least once annually. Each child

that experiences this symptom will average nearly 4.5 such occurrences each year. *Id.* at 38,865/3. This certainly will impact that child's ability to attend school, and his or her ability to participate in outdoor recreation and instruction.

Numerous studies have detailed the importance of physical activity in human development. The American Academy of Pediatrics ("AAP") notes the following potential benefits of physical activity in children: preventing high blood pressure, strengthening bones, warding off heart disease and other medical problems, developing a habit of physical activity that carries into adulthood, and maintaining or achieving proper weight. The AAP also cites as a major benefit of physical activity in children and young adults the relief of stress related to family problems, social conflicts and school pressures. American Acad. of Pediatrics, *Better Health & Fitness Through Physical Activity* (No. HE0090 1996). Furthermore, participation in team sports assists the development of the ability to work with others and good sportsmanship. *See Land for Learning*, *supra*, at 39.

The psychological and emotional benefits of physical activity for minors are well-documented. To further these benefits children should be offered a wide range of activities, including a wealth of outdoor activities, to ensure that each child finds suitable interests. Any deterrent to these pursuits should be reasonably reduced. Ozone pollution can substantially impact sensitive children, especially the increasing numbers of those with asthma, and hinder their participation in vital physical activity.

In the interest of taking every reasonable step to promote the physical and mental well-being of children, the *amicus* contends that the eight hour ozone standard is necessary to ensure that children's academic, physical, and social development are not hindered by the adverse effects of tropospheric ozone.

III. A NATIONAL STANDARD IS ESSENTIAL TO ACHIEVE THE PUBLIC HEALTH OBJECTIVE AND TO ENSURE A LEVEL ECONOMIC PLAYING FIELD

North Carolina has voluntarily adopted the eight hour standard, and is proceeding to implement it. But it is only one of two states to take this step.[2] The *amicus* applauds the adoption by EPA of a national standard that adequately protects public health, but suggests that absent uniform enforcement of the standard, which is substantially inhibited by the Court of Appeals decision, North Carolina's efforts might not yield the projected health benefits and in the process will subject the State's industry and consumers to an unfair financial burden.

Compliance with the eight hour standard will save the State and its citizens and businesses millions of dollars from, for example, worker-hours that are not lost and crops that are not damaged. But, of course, ozone pollution knows no political boundaries. Even North Carolina's best efforts alone do not guarantee the safety and health of its population, and

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[2] Delaware also has promulgated the eight hour standard. *See* Del. Admin. Code 70-100-003 § 6.2.

will not result in these projected economic benefits if sources in nearby states are not subject to equally stringent controls.

The interstate ozone transport problem is directly observable in the Great Smoky Mountains, which are home to the Great Smoky Mountains National Park. The park -- truly a national treasure -- is the most visited national park with over nine million visitors annually. But in 1998, ozone levels in the park exceeded the eight hour standard on 44 days -- the most of any national park for that year. The park also recorded 52 days of exceedances in 1999 and 22 so far this year.[3] Ground-level ozone hampers physical activity in the park and degrades vegetation. North Carolina has proposed that the area be designated nonattainment under the eight hour standard.[4]

Ozone violations in the North Carolina mountains result not only from sources within the State, but also from ozone precursors that originate as near as Tennessee and as far away as Illinois and Louisiana. North Carolina's adoption of the eight hour standard will not affect these foreign sources and will not sufficiently reduce ozone levels in the mountains. Moreover, the lack of an enforceable national eight hour standard will deprive the State of the remedy Congress made available under section 126 for interstate pollution abatement.

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[3] As of August 18.

[4] The National Park itself is a Federal Class I Area that will receive some special protection under the EPA's recently promulgated Regional Haze Regulations. *See* 40 C.F.R. Part 51. But other areas of the State's vast mountains suffer from similar ozone maladies and are protected only by the usual Clean Air Act tools and the State's own efforts.

See 42 U.S.C. § 7426. A national standard is needed to address this problem.

The State is gravely concerned that its leading role in the protection of public health will negatively impact its economic growth relative to its sister states. In order to comply with the eight hour standard North Carolina will seek reductions in ozone precursors from both stationary and mobile sources. State regulators expect substantial reductions in NO_x[5] emissions from compliance with Title IV of the Clean Air Act and the recent SIP revisions ordered by the EPA. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (codified at 40 C.F.R. Parts 51, 72, 75 & 96) ("NO_x SIP Call"). However, the State anticipates that these reductions will not be sufficient to achieve compliance with the eight hour standard. Thus, North Carolina's ozone plan ultimately will require additional controls on individual stationary sources, mostly in and near metropolitan areas, which controls are more stringent than those required by the NO_x SIP Call.[6] Although the extent of these controls has yet to

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[5] Oxides of nitrogen, or NO_x, are chemical precursors of ozone and reductions in emissions of NO_x result in reduced tropospheric ozone levels.

[6] Through the NO_x SIP Call, EPA has required 22 eastern states to impose controls on sources of NO_x that "contribute significantly to nonattainment in, or interfere with maintenance by" other states. 42 U.S.C. § 7410(a)(2)(D)(i)(I). North Carolina joined several states in challenging this rule. *See Michigan v. United States Envtl. Protection Agency*, 213 F.3d 663 (CADC 2000). North Carolina believes that interstate transport of NO_x

(continued...)

be determined, the plan assuredly will result in increased costs to industry that will be passed on at least in part to small businesses and consumers.

The North Carolina General Assembly last year enacted the Ambient Air Quality Improvement Act of 1999 to expand the vehicle inspection and maintenance program to nearly half of all the counties in the State by 2006. *See* 1999 N.C. Sess. Laws 328, Part III (codified in part at N.C.G.S. § 143-215.107A(c)). The program was refined in 2000 to allow for the use of onboard diagnostic equipment. *See* 2000 N.C. Sess. Laws 134, § 8 (to be codified at N.C.G.S. § 20-183.3). It is expected that the incremental cost to consumers of the inspection alone will exceed $35,000,000, at an average cost of $13.30 per vehicle per year. This figure does not include repair costs to the consumer resulting from the detection of emissions equipment failures. In addition, North Carolina will seek EPA's approval to reduce the sulfur content of gasoline two years prior to the national deadline. 1999 N.C. Sess. Laws 328, Part II (codified in part at N.C.G.S. § 119-26.2) (setting 2004 as deadline); 40 C.F.R. § 80.195; 42 U.S.C. § 7545(c)(4)(C) (providing exemption from pre-emption). The cost to consumers over those two years will be just short of $100,000,000.

A national ambient ozone standard that protects the public from the health risks evidenced in the record would alleviate

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[6] (...continued)
is a serious threat to public health and national standards are required to abate this problem. The State disagrees only with EPA's approach to the matter, and not EPA's goal of reducing tropospheric ozone levels.

the disparate economic consequences to states such as North Carolina that choose to implement the eight hour standard.

CONCLUSION

For all of the foregoing reasons, the *amicus* respectfully requests that this Court reverse the decision of the Circuit Court.

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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, et al.,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE CLEAN AIR TRUST AND SENATOR ROBERT STAFFORD AS *AMICI CURIAE* IN SUPPORT OF CROSS-RESPONDENTS

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THE INTEREST OF AMICI CURIAE[1]

The Clean Air Trust was established in 1995 by Senators Edmund Muskie (D-ME), and Robert Stafford (R-VT) to educate the public and policymakers about the value of the Clean Air Act, to attain and maintain national ambient air quality standards, to promote effective enforcement of the Act through grassroots education, and to defend the Act. Senator Robert Stafford was a member of the Senate from 1971 to 1989, and chaired the Environment and Public Works Committee 1981-1985. The President of the Clean Air Trust, Leon Billings, was staff director of the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, which Senator Muskie chaired, during the period in which the national ambient air quality standards ("NAAQS") provisions were being debated, enacted and implemented. The Clean Air Trust has access to extensive records documenting the Congress's responses to the nation's air quality problems since the early 1960s. Amici can offer helpful guidance to the Court by providing an authentic account of the development of the 1970 NAAQS provisions, based on public record sources that are highly reliable. That account shows conclusively that Congress adopted a coherent and sensible regulatory strategy in 1970, which

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici, or its counsel, has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, amici state that the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

included primary NAAQS based exclusively on health considerations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For thirty years, the plain meaning of the Clean Air Act has always required EPA to base primary national ambient air quality standards ("NAAQS") solely on the health effects caused by air pollution. Cross-Petitioners now ask this court to ignore that meaning and to rule that the statute actually requires EPA to "balanc[e] a broad range of factors," Brief for Respondents Appalachian Power, et al., In Support of Petitioner 23 ("App.Pr.Br."), and to "consider countervailing 'non-health' factors," Brief for Cross-Petitioners 50 ("ATA Br."), in issuing the NAAQS.

This Court can and should reject Cross-Petitioners' claim based on the statutory language and structure alone. Cross-Petitioners hope to convince this Court to twist the statute in their direction by arguing that setting the primary NAAQS on the basis of health considerations alone inevitably produces irrational policy, and that their proposal is only common sense. This argument fails, though, because it is wrong on its own terms. Congress acted deliberately, rationally and sensibly in 1970, when the NAAQS provisions were introduced into the law. Congress gave EPA only limited authority in setting health-based NAAQS, and reserved to itself reconsidering the statute after its new philosophy toward air pollution control had been given a chance to work, all as part

of a coherent strategy to stimulate technological innovation to solve a pressing national health problem. While the approach taken in 1970 was itself innovative, the ability of Congress to delegate limited powers to an agency, as it did here, was and remains well-established.

The statute's meaning is amply confirmed by uncontradicted evidence of how the vocabulary used in the 1970 Act evolved during the prior decade of intense federal engagement with the problems of clean air. Overwhelming and reliable evidence confirms that the key concepts of "criteria" and "protection of the public health" were well established by the time the 1970 Act was passed, as was the desirability of an exclusively health-based minimum national standard.

ARGUMENT

I. CONGRESS HAS PRECISELY STATED THAT THE PRIMARY NAAQS ARE TO BE BASED ONLY ON THE HEALTH EFFECTS ASSOCIATED WITH THE PRESENCE OF AIR POLLUTION IN THE AIR.

Congress has spoken to the precise question Cross-Petitioners put at issue, and Cross-Respondents' briefs fully present the overwhelming textual and structural case for the statute's meaning. Here, we merely highlight three telling features of the legislation.

The Administrator of EPA must issue primary NAAQS that are in her judgment "requisite to protect the public health" "based on such criteria and allowing an adequate margin of safety." § 109(b)(1). "Such criteria"

refers to the information that EPA must issue under § 108, indicating "the kind and extent of all identifiable effects on public health or welfare which may be expected from *the presence of* such pollutant in the ambient air, in varying quantities." § 108(a)(2) (emphasis added). Criteria thus correlate levels of air pollution with the effects caused by that pollution. This is an entirely distinct inquiry from determining the effects of controlling pollution or assessing countervailing costs.

For the five pollutants for which criteria had already been issued prior to passage of the NAAQS provisions in 1970,[2] the 1970 Act required EPA to propose NAAQS within thirty days of enactment. § 109(a)(1)(A). This was far too little time for EPA to perform any additional analysis beyond what was already contained in the criteria documents themselves. As Congress well knew, those criteria documents contained absolutely no information concerning countervailing costs. Their content was exclusively focused on health or welfare effects associated with the presence of air pollution in the air, as required by the statute.

Not only did the short one month period limit EPA to relying solely on the criteria documents, the express requirement that the NAAQS be "based on such criteria" does so as well. That language stands in marked contrast to then-existing law, which required air quality standards

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[2] *See* HEW, National Air Pollution Control Administration, Air Quality Criteria for Particulate Matter, Pub. No. AP-49 (1969); for Sulfur Oxides, AP-50 (1969); for Carbon Monoxide, AP-62 (1970); for Photochemical Oxidants [Ozone], AP-63 (1970); for Hydrocarbons, AP-64 (1970).

to be "consistent with the criteria and the recommended control techniques." 42 U.S.C. § 1857d(c) (1964 & Supp. III 1964-67). In a provision distinct and separate from the criteria, then-existing law required HEW to issue "recommended pollution control techniques," along with information on "available technology," "economic feasibility," and "cost-effectiveness analyses." § 1857c-2(c). If Congress had intended the NAAQS to be based on such factors as these, as Cross-Petitioners contend, it would not have deliberately eliminated the connection of this control technique information to the NAAQS when it enacted the 1970 Amendments.

II. CONGRESS'S LIMITED DELEGATION TO EPA TO CONSIDER ONLY HEALTH EFFECTS IN SETTING THE NAAQS IS SOUND AND RATIONAL POLICY.

All parties to this case must agree that our government's laws should always be expected to do more good than harm. *See* ATA Br. 43. Cross-Petitioners claim, however, that unless the Environmental Protection Agency weighs costs against benefits each time it issues a NAAQS, those standards must be "of necessity, arbitrary." *Id.* 29. This is a gross misunderstanding of the Constitution's division of labor under the principles of separated powers. Congress has the responsibility in the first instance to make policy choices that do more good than harm, and it also has the Constitutional authority to choose an approach to a problem that delegates limited responsibilities to an administrative agency. In the environmental area, as in others, Congress's choices come to this Court with a strong presumption that they have a

rational basis. *See, e.g., United States v. Nat'l Treas. Emp. U.*, 513 U.S. 454, 468 (1995). In contrast, an agency's first responsibility is to be faithful to the delegation Congress has made, so that it cannot and should not "balanc[e] a broad range of factors," App.Pr.Br. 23, unless Congress has directed or permitted it to do so. Whenever traditional tools of statutory construction demonstrate that Congress has *not* delegated an authority or responsibility to the agency, "that is the end of the matter, for the court, as well as the agency." *Chevron v. NRDC*, 467 U.S. 837, 842 (1984).

In 1970, Congress had ample reason to decide that delegating responsibility to set primary NAAQS based on health effects alone was part of a legislative approach to improving air quality that would do more good than harm. The nation's air quality was deteriorating, and pollution had become the nation's most serious problem in the minds of its citizens.[3] The inadequate existing federal policy had been predicated on exactly the course that Cross-Petitioners now urge, with air quality standards limited by technological feasibility and economic cost.[4] Congress had come to understand the problems

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[3] *See* Issue of the Year: The Environment, *Time* at 21 (Jan. 4, 1971) (reporting Harris poll showing "Americans now regard pollution as 'the most serious' problem confronting their community – well ahead of crime, drugs and poor schools.")

[4] *See* Thomas Jorling, The Federal Law of Air Pollution Control, in *Federal Environmental Law* 1058, 1060 n.9 (Environmental Law Institute, Erica Dolgin & Thomas Guilbert, eds. 1974) (citing pre-1970 sources). Mr. Jorling was minority counsel on Senate Committee on Public Works as it was drafting the 1970 Act.

with such a strategy, which relied heavily on the assistance of industry to develop costly technologies when this was against their self-interest.[5] In order to change industry's incentives so as to stimulate the technological innovation crucial to solving a pressing health problem, Congress adopted health-based minimum standards with deadlines for compliance backed by sanctions. As Senator Muskie, the chief architect of the Clean Air Act Amendments of 1970, explained it to his colleagues, such an approach was

> probably the only way in which we are really going to generate the sense of urgency that is necessary to deal with this problem of air pollution effectively. We have tried other ways and they have not worked . . . The legislation on auto exhaust is an illustration of how the thing can stretch out if you leave it to administrative discretion and the technology which the industry is willing to develop.[6]

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[5] As Senator Muskie said, "It is difficult to draw precise lines in these instances, because those who will be required to provide the technological know-how tend to resist, and we have to try to form independent judgments as to what may be possible. And they are not of particular assistance to us in forming those judgments." *Executive Session of the Senate Committee on Public Works*, 91st Cong. 2nd Sess. 114-15 (Aug. 31, 1970), Edmund S. Muskie Archives, Bates College, Lewiston, Maine, Folder SE3041-4. The automobile industry had provided the best object lesson in how slowly technological breakthroughs by industry occur when this is the incentive structure, as there had been a federal presence in addressing the auto exhaust problem since 1955.

[6] *Executive Session of the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 91st Cong. 2nd Sess. 14-15 (July 23, 1970), Edmund S. Muskie Archives, Bates College, Lewiston, Maine, Folder SE3041-1.

So Congress deliberately "abandon[ed] the old assumption of requiring the use of only whatever technology is already proven and of permitting pollution to continue when it is not economically feasible to control it."[7] In imposing sanctions for non-compliance by a date certain, Congress sought to achieve a health-based minimum level of air quality by giving industry self-interested reasons to "stretch[ ] the [technological] possibilities . . . to find ways to do things that we are told in many, many instances cannot be done."[8] This "deliberate decision to rule out arguments based on" some factors otherwise relevant to a full cost benefit inquiry stands at

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[7] Senate Debate on S. 4358, 116 Cong. Rec. 32919 (Sept. 21, 1970) (remarks of Senator John Sherman Cooper (R-KY)) *reprinted in* Senate Comm. on Public Works, 93rd Cong. 2nd Sess. 1 *Legislative History of the Clean Air Act Amendments of 1970* 262 (Serial No. 93-18 1974) ("1970 Leg. History"). *See also*, 116 Cong. Rec. 32919 (remarks of Senator Howard Baker (R-TN) (bill represents a "basic change in the philosophy of the Government of the United States toward" air pollution)), *reprinted in* 1 *1970 Leg. History* 265. Congress had been studying the incentives problem for years. *E.g.*, Air Pollution – 1967 *Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, on S. 780 and Related Matters Pertaining to the Prevention and Control of Air Pollution*, 90th Cong. 1st Sess. at 760-61 (Feb. 8, 1967) (HEW Secretary John Gardner describing incentive problem); *id.* at 1-20 (Feb. 13, 1967) (Subcommittee discussing incentives and the need for stringent regulations with California officials).

[8] *Executive Session of the Senate Committee on Public Works*, 91st Cong. 2nd Sess. 114-15 (Aug. 31, 1970) (remarks of Senator Muskie), Edmund S. Muskie Archives, Bates College, Lewiston, Maine, Folder SE3041-4.

the very heart of the 1970 Act,[9] and, like the Clean Water Act decisions Congress would make two years later, Congress acted here "based on long experience, and aware of the limits of technological knowledge and administrative flexibility."[10]

Fully cognizant that air pollution control would be costly,[11] Congress still believed that the approach of the 1970 Act was justified by the urgency of the problem. Experts from the Administration had testified that the necessary technology was close at hand even though they

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[9] The limitations on tailpipe emissions from automobiles received even more attention than the NAAQS provisions, and these also precluded EPA from considering countervailing factors, this time by means of Congress enacting the standards directly into law, § 202(b), P.L. 91-604, 84 Stat. 1676, 1690, even though the auto industry said it lacked the technology to implement them.

[10] *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042 (D.C. Cir. 1978). In the case of clean water, Congress ruled out arguments based on potentially monetizable benefits in deciding that all firms must apply best practicable technology to abate their water effluent, regardless of the effects their pollution was having on receiving water quality. *Id.*

[11] *See, e.g.*, Senate Debate on H.R. 17255 Conference Report, 116 Cong. Rec. 42392 (Dec. 18, 1970) (remarks of Senator Randolph (D-WV) (noting that the Muskie Subcommittee and the full Public Works Committee had "talked about the economics of this legislation as well as the health standards of the legislation," and that "it will be costly.")), *reprinted in* 1 *1970 Leg. History* 145. *See also*, Philip Abelson, Progress in Abating Air Pollution, 167 *Science* 3 (No. 3925, March 20, 1970) (noting public can expect a six to ten percent increase in electricity prices from reductions in sulfur content of coal alone, but concluding that "this seems a small price to pay" "in view of the health hazards and other costs.").

would not commit to a definite date.[12] Congress knew that industry estimates of capability tended to overstate costs and understate technological ability, and for that reason industry was going to be "of no particular assistance" to Congress making the judgments Congress had to make.[13]

Just as importantly, Congress was not shirking the issue of costs when it did not delegate the authority to balance costs and benefits in setting the NAAQS.[14] As Senator Muskie declared in discussing the deadlines for meeting health-based standards, "[w]e want to give the country a clear cut goal and say this is the goal. Congress

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[12] Air Pollution – 1970 Part 4, *Hearings Before the Subcommittee on Air and Water Pollution, Senate Committee on Public Works*, 91st Cong. 2nd Sess. 1505 (1970) ("1970 Senate Hrgs.") (Dr. John Middleton, head of NAPCA, testifying that "I think the levels we have come across in relation to adverse health effects are achievable and they are achievable in short periods of time."), *reprinted in* 2 *1970 Leg. History* 1200; *see also, e.g.*, Senate Debate on S. 4358, 116 Cong. Rec. 32919 (Sept. 21, 1970) (remarks of Senator Cooper (R-KY)) ("I do not know if the [NAAQS] . . . can be accomplished in all places by 1975. However, as emphasized by the Senator from Maine [Muskie – D(ME)] and the Senator from Delaware [Boggs – R(DE)], we have set these standards because we believe that they can be met."), *reprinted in* 1 *1970 Leg. History* 261.

[13] *See* n.5, above.

[14] Nor was Congress eliminating costs from consideration in the overall implementation of the Act. For instance, state implementation plans can select the most cost effective means of compliance, delayed compliance orders, added later to the Act, permit some consideration of costs, and Congress has revisited the statute to make adjustments when costs have proven to be imposing. *See* n.17, below.

says it is. . . . If the decision is important enough for the Congress to make in the first instance, then only the Congress ought to change it."[15] Congress could revisit the Act after its approach had been given a chance to succeed, and when industry had made good faith efforts to comply.[16] Congress could then make adjustments to

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[15] *Executive Session of the Senate Committee on Public Works*, 91st Cong. 2nd Sess. 349-350 (Sept. 10, 1970), Edmund S. Muskie Archives, Bates College, Lewiston, Maine, Folder SE3041-6.

[16] *See, e.g.*, Senate Debate on S. 4358, 116 Cong. Rec. 32905 (Sept. 21, 1970) (remarks of Senator Muskie ("Congress, I assume, will be in session in 1971, 1972, 1973, 1974 and 1975 . . . The companies would be in a position to make their case. If the Congress, which would have made the policy in the first instance, is persuaded that the industry cannot do the job, Congress could change the policy . . . [T]his would be – as it is now – a policy decision of such moment to the country that it ought to be made by nobody other than the Congress, so that the decision gets the visibility, the prestige and the responsibility that are necessary to deal with this problem.")), *reprinted in* 1 *1970 Leg. History* 236; Senate Debate on H.R. 17255 Conference Report, 116 Cong. Rec. 42389 (Dec. 18, 1970) (remarks of Senator Baker (acknowledging that under the bill "the legislative department will be called upon to sit as a factfinding body to decide whether or not the automobile industry will be permitted to continue manufacturing automobiles, assuming it has not fully met this statutory deadline," even though he thought this to be "a horrible prospect.")), *reprinted in* 1 *1970 Leg. History* 142. *See also*, Roger Strelow, Reviewing the Clean Air Act, 4 *Ecol. L. Q.* 582, 588 (1975) (Critics claim the Act "unreasonably demands clean air to the detriment of conflicting social and economic considerations . . . A more pragmatic view of the Act, however, suggests that Congress simply wanted to ensure that maximum cleanup was achieved and that the consequences of an unqualified commitment to clean air were explored before the Act's limited provisions for 'balancing' clean air with other values were expanded.").

accommodate countervailing costs it believed weighty enough to warrant them.[17] Congress behaved responsibly in keeping in its own hands the question of how to balance the nation's health against the countervailing costs. When human health is involved, "[t]here is no economics that tells you the right results . . . there is no economics that tells . . . us how much we're prepared to spend . . . on the life of another person . . . [T]hat's a decision that people make through their elected representatives."[18]

By mandating health-based NAAQS, Congress was exercising its well-recognized Constitutional authority to delegate to an agency only one aspect of a problem at a time. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Congress has made similar limited delegations innumerable times, often in ways that deny an agency the authority to conduct the kind of wide ranging cost-benefit inquiry that Cross-Petitioners erroneously contend EPA must have. For example, Congress has denied the Secretary of Transportation authority "to engage in a wide-ranging balancing of competing interests," in favor

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[17] Indeed, since 1970, Congress has made a number of adjustments in the Act to accommodate difficult compliance problems, but it has never altered the NAAQS. For details, *see* the Briefs of Cross-Respondent American Lung Association, and of Environmental Defense, et al., as *Amici Curiae* in Support of Respondents.

[18] Nomination of Stephen G. Breyer to Be An Associate Justice of the Supreme Court of the United States, *Hearings Before the Senate Judiciary Committee*, 103rd Cong. 2nd Sess. 276-77 (S.Hrg. 103-715, July 13, 1994) (testimony of then-Judge Stephen Breyer).

of making "protection of parkland [of] paramount importance" in selecting routes for the interstate highway system. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-412 (1971). Similarly, Congress has required the FDA to restrict its safety inquiry to "determin[ing] that the product itself is safe as used by consumers," prohibiting it from considering other "countervailing effects" such as the effects of leaving the product on the market. *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1304 (2000). Not only does the record show Congress made a rational, considered judgment, the regulatory regime it established is fully within Congress's competence. This Court must respect that judgment.

III. THE HEALTH-ONLY BASIS OF THE PRIMARY NAAQS IS OVERWHELMINGLY CONFIRMED BY THE EVOLUTION OF FEDERAL AIR POLLUTION POLICY.

The "history of evolving congressional regulation in [an] area" can properly inform the Court's understanding of legislative meaning. *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 463, 475 (1997). In the case of the Clean Air Act, its evolution in the 1960s confirms conclusively that the key terms Congress used in 1970 to describe EPA's NAAQS responsibilities already had well-established meanings that excluded the consideration of costs in setting minimum standards. "Criteria" always referred to the effects on health or welfare caused by various concentrations of ambient air pollution, as ascertained by the best available science. "Protection of the public health" referred to a level of air pollution at or below the lowest level at which the criteria identified adverse

health effects. Countervailing costs played no role in either term, and non-health considerations played no role in the idea of protecting human health. The evolution of federal air pollution policy further shows a consensus that a health-based, criteria-based standard ought to be a national minimum standard. This consensus emerged even prior to passage of the 1970 Act, and was never challenged.

These conclusions are confirmed by abundant evidence in a variety of settings in which the speakers and writers had no strategic reason to dissemble regarding the issues Cross-Petitioners raise. Indeed, they had every reason to communicate as clearly as possible. This is because until very late in the drafting of the 1970 Act, countervailing costs were being amply taken into account in federal air pollution policy, both in setting the time for compliance, and in determining whether standards below a health-based minimum should be set. When the 91st Congress moved to a Clean Air Act that set fixed deadlines for complying with a national standard, it was too late to alter the meanings of the terms that defined that standard, even if anyone had tried.

A. Throughout the Evolution of Federal Air Policy, "Criteria" Always Referred Only to the Effects Caused by Air Pollution, Not to the Countervailing Economic Costs of Controlling Air Pollution.[19]

The Clean Air Act of 1963 introduced the concept of "criteria" into the federal regulatory vocabulary, describing criteria in terms that have remained essentially unchanged. It directed that the Secretary of HEW

> [w]henever he determines that there is a particular air pollution agent [in the air and harmful to health or welfare], . . . shall compile and publish criteria reflecting accurately the latest scientific knowledge useful in indicating the kind and extent of such effects which may be expected from the presence of such air pollution agent . . . in the air in varying quantities. § (3)(c)(2), P.L. 88-206, 77 Stat. 392, 395.

The Act contained no explicit provisions for standard setting. Instead, it "encouraged" municipal, State, and interstate action to abate pollution, § 5(b), *id.*, and it authorized the Secretary to "recommend . . . such criteria of air quality as in his judgment may be necessary to protect the public health and welfare." § 3(c)(3), *id.*

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[19] This part summarizes the evolution of federal air pollution policy as it relates to the terms with which the NAAQS requirements are expressed. A more detailed summary of the development of federal policy can be found in Brief of Respondents Massachusetts and New Jersey in Support of Petitioners, in *Browner v. Amer. Trucking Ass'n*, 99-1257, at 7-19.

As Congress was considering the Air Quality Act of 1967, it heard testimony about how HEW was implementing the 1963 Act. Dr. John Middleton, head of the National Air Pollution Control Administration (NAPCA) within HEW, and in charge of the federal air quality efforts, testified that

> air quality criteria are an expression of the scientific knowledge of the relationship between various concentrations of pollutants in the air and their adverse effects on man, animals, vegetation, materials, and so forth. . . . They describe the effects that can be expected to occur whenever and wherever the ambient air level of a pollutant reaches or exceeds a specific figure for a specific time period.[20]

At the time he testified, NAPCA had just issued the first criteria document, for sulfur oxides, so Congress had a precise illustration of what criteria included and what they did not include. The sulfur oxide criteria focused exclusively on scientific studies describing adverse effects on health or welfare that were or might be caused by various levels of sulfur oxide in the air. Neither it nor any other criteria issued by EPA contained any mention of the costs of removing pollution from the air.[21]

Dr. Middleton's succinct description reflected Congress's understanding of the contents of the criteria. It

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[20] Air Pollution – 1967, *Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, on S. 780 and Related Matters Pertaining to the Prevention and Control of Air Pollution*, 90th Cong. 1st Sess 1154 (1967) (Comm. Print).

[21] N.2, above, identifies the five criteria documents issued prior to 1971.

was explicitly quoted by both House and Senate Reports accompanying the 1967 Act,[22] repeated by Dr. Middleton in later testimony[23] and by the executive branch in air quality guidance documents,[24] quoted in other Congressional Reports,[25] and quoted or paraphrased in the academic journals.[26]

Statutory revisions in 1967 and 1970 changed the description of criteria cosmetically, but the core definition never changed, and there was never any indication that the Congress – or anyone else knowledgeable about the development of air pollution policy – ever thought the content of "criteria" had been changed to include economic costs.[27] Criteria continued to "define the health

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[22] S. Rep. 90-403 5 (1967); H. Rep. 90-728 16 (1967).

[23] *E.g.*, 1 *1970 Senate Hrgs.* 160, *reprinted in* 2 *1970 Leg. History* 1000.

[24] HEW, National Air Pollution Control Administration, Guidelines for the Development of Air Quality Standards and Implementation Plans 4 (1969) ("HEW Guidelines").

[25] Air Quality Criteria, *Staff Report for the Subcommittee on Air and Water Pollution, Senate Committee on Public Works*, 90th Cong. 1st Sess. 2-3 (1968) (Comm. Print).

[26] *See, e.g.*, Robert Martin and Lloyd Symington, A Guide to the Air Quality Act of 1967, 33 *Law & Contemp. Prob.* 239, 251-52 (Spring, 1968); Note, The Air Quality Act of 1967, 54 *Iowa L. Rev.* 115, 126 (1968).

[27] In 1967, the criteria were to reflect "the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollutant . . . in the ambient air, in varying quantities." § 107(b)(1), P.L. 90-148, 81 Stat., 485, 491. Both the House and Senate Reports accompanying the 1967 Air Quality Act explicitly employed Dr. Middleton's definition, *see* n.22, above, and in 1968 a staff report of Senator Muskie's subcommittee stated that the 1967 Act had "reaffirmed" the

and welfare considerations that must be taken into account in the development of standards and regulations. Economic and technical considerations have a place in the pattern of control activity but not in the development of criteria."[28]

B. Throughout the Evolution of Federal Air Policy, "Protection of the Public Health" Was Understood to Require an Exclusively Health-Based, Criteria-Based Level of Air Quality.

In 1967, Congress for the first time provided direction to the States as to what kind of air quality standards they ought to develop, providing that the Secretary of HEW was to approve state standards that were "consistent with the criteria and the recommended control techniques." § 108(c)(1), P.L. 90-148, 81 Stat. 485, 492. Subsequently, HEW issued guidelines describing what standards it would find acceptable, stating that "it is the intent of the Air Quality Act . . . to provide for the attainment throughout every air quality control region of

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1963 Act's call for criteria development. n.25, above, at 2. In 1970, the criteria also were to reflect "the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." § 108(a)(2), P.L. 91-604, 84 Stat. 1676, 1678. The 1970 Act explicitly ratified the criteria that HEW had already issued under the 1967 Act as forming the basis for national standards, § 109(a)(1)(A), *id.* at 1679, demonstrating that Congress thought it was not making any material change in the required content of the criteria.

[28] H.Rep. 90-728 16 (1967).

air quality which, at a minimum, is *adequate for the protection of the public health,*"[29] essentially the same language that Congress would later use to describe the NAAQS.[30]

As states began submitting standards and plans to HEW for approval, it became evident that HEW understood "adequate for the protection of the public health" to mean levels at or below the level identified by the criteria as the lowest at which HEW concluded adverse health effects had been shown. Dr. Middleton explained how HEW was implementing the 1967 Act:

> Let's take the example of the standards being adopted for sulfur oxides. The standard being adopted by the States which are acceptable to the Secretary are less than 0.04 parts per million (p.p.m.) as an annual average. Most states are coming up with air quality standards that are 0.03 p.p.m. or smaller . . . [31]

According to the criteria document, 0.04 p.p.m. was the point where "the health effects begin."[32]

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[29] HEW Guidelines 17 (emphasis added).

[30] The core of the definition of "criteria" in the 1967 Act contains the same phraseology as the primary and secondary NAAQS in the 1970 Act. § 107(b)(1), P.L. 90-148, 81 Stat. 485, 491 (Secretary shall issue criteria "as in his judgment may be requisite for the protection of the public health and welfare").

[31] *1970 Senate Hrgs.* 1492, *reprinted in* 2 *1970 Leg. History* 1187 (1970).

[32] *1970 Senate Hrgs.* 1500, *reprinted in* 2 *1970 Leg. History* 1195 (1970).

Costs and technological feasibility played roles in the local debates over whether to adopt standards more stringent than the required federal minimum (a number of states did indeed adopt more stringent standards) and in the determination of a "reasonable" compliance time,[33] but costs and technological feasibility played no role in setting the minimum health-protective air quality levels.

In 1970, both the Congress and the Nixon Administration concluded that further statutory reforms were needed to strengthen the federal law. The Administration initiated the idea of national ambient air quality standards, sending Congress language that would require the Secretary to "publish . . . proposed regulations establishing nationally applicable standards of air quality for any pollutant or combination of pollutants which [the Secretary] determines endanger or may endanger the public health or welfare and with respect to which criteria have

[33] The 1967 Act required whatever levels the states established to be achieved "within a reasonable time." 42 U.S.C. § 1857d(c) (1964 & Supp. III (1964-67)). "The implementation plan must assure achieving the standards of air quality within a reasonable time, as economic and technological feasibility permit." Robert Martin and Lloyd Symington, A Guide to the Air Quality Act of 1967, 33 *Law & Contemp. Prob.* 239, 256 (Spring, 1968).

been issued . . . "[34] Even this language, despite being much vaguer than the language ultimately enacted, was understood as setting health-based minimum standards, based on the criteria. Under Secretary of HEW John Veneman explained how the administration's standards would work:

> [Let me] give an example so that maybe we can make it clear. For example, in the criteria that were established for sulfur oxides, the minimum identifiable human health effect occurs at a level of 0.04 ppm. Now, in establishing a national air quality standard, it would be below that. It would not be above that. Now, what we are suggesting is that you do not set standards just at the point of minimum impact or effect on human health. They have to be below that. We are suggesting that if a state or an area within a state, even the intrastate regions, wants to reduce that even below the national standard, they would have the prerogative.[35]

This statement of the administration's position draws a simple and direct connection between criteria and the national standard. The level of 0.04 ppm in the criteria document rested exclusively on medical evidence of health effects caused by sulfur oxides at that concentration.

[34] On the Senate side, the Administration proposal was S. 3466. In the House, it was H.R. 15848. *See* § 107(a), S. 3466, *reprinted in* 2 *1970 Leg. History* 1483; H.R. 15848, *reprinted in* Air Pollution Control and Solid Wastes Recycling, *Hearings Before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce*, 91st Cong. 1st and 2nd Sess. 177 (Serial No. 91-49, 1970).

[35] *1970 Senate Hrgs. 159, reprinted in* 2 *Leg. History* 999.

Even industry spokespersons shared the conception of the national standard as directly derived from the exclusively health-based criteria. For instance, Fred E. Tucker, Manager, Pollution Control and Services for the National Steel Corp., testified in support of the Administration's call for national standards: "We simply feel that the adoption of the air quality criteria papers presented [by HEW] to date as standards would speed up the implementation of air quality control. . . . We have air quality criteria documents available today . . . [T]here is no objection on my part as an industry representative to see those criteria adopted as national standards immediately." *1970 Senate Hrgs.* 245-246.

Mr. Tucker spoke of *adopting* the criteria *as* standards. He did not advocate writing national standards only after weighing countervailing factors against the criteria's findings on adverse health effects. He simply urged the federal government to take the criteria's numerical levels for adverse health effects, and make those levels legally binding.[36]

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[36] This was entirely consistent with industry's self-interest, so they had no reason to be duplicitous about it. At the time, they were reeling from a series of regional standard-settings in which states had acceded to public demand and adopted standards even lower than the HEW recommendations. *See 1970 Senate Hrgs.* 240-41 (Tucker testifying to several states adopting standards lower than the federally acceptable levels). They hoped that national standards, together with the elimination of public hearings at the regional level (which had become a venue for citizen agitation for stringent standards) would make it more likely that states would adopt the national standards.

C. Although There Was Debate Over Fixed Deadlines for Compliance, No One Doubted That the 1970 Primary NAAQS Would Be Exclusively Health-Based.

The Administration's proposal for national health-based standards gained industry support because the Administration bill continued to provide a "reasonable time" for compliance, and this provided ample room for arguments based on technological feasibility and cost. As Senator Pete Domenici (R-NM) would note later, the 1970 Act "basically [has] two working parts, standards and deadlines."[37] So long as deadlines could be "reasonable" in light of costs, health-based standards were acceptable to industry and to the Administration.

The House passed its version of the 1970 Act on June 10, 1970, defining the Secretary's national standards obligation in terms materially identical to the Administration's proposal, and also allowing a "reasonable time" for compliance.[38] On the Senate side, though, hearings

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[37] Pete V. Domenici, The Clean Air Act Amendments: Balancing the Imponderables, *reprinted in* Senate Committee on Environment and Public Works, 6 A Legislative History of the Clean Air Act Amendments of 1977, 96th Cong. 2nd Sess. 4508 (1978).

[38] H.R. 17255 Sec. 2 and 4 (adding 107(e)(1) and 108(c)(1)(C)(i) to the Air Quality Act), reprinted in 1 *1970 Leg. History* 911, 914. The only difference between the Administration proposal and H.R. 17255 as passed by the House was that the House bill retained the requirement that criteria had to have been issued before standards could be, whereas the Administration proposal dropped that requirement. *See* S. 3466, Sec. 6, amending § 107(a) of the Air Quality Act, *reprinted in* 2 *1970 Leg. History* 1482-83.

and committee meetings progressed through the summer and fall of 1970. There, the idea of fixed deadlines developed momentum. A "standard" without a definite attainment date came to be seen as no improvement over current law.[39] Despite continuing Administration advocacy for a reasonable compliance time,[40] the Senate

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[39] *See, e.g,* Senator Eagleton's comments to Dr. Middleton, who presented the Administration position:

> This is where I get hung up on a national standard. If indeed it is national, for all 50 States, then it would seem to me that it ought to be attainable within a reasonably foreseeable period of time, applied nationwide, with no exceptions, or then in truth it is not a national standard, and we are right back where we are. . . . You [Dr. Middleton] and I disagree. You say there is a benefit to be gained by telling the public that we have a national standard which you say is really a national goal . . . I just don't see a national standard that is a national standard, unless you set specific target dates, is really helping to achieve anything, beyond what you are presently doing . . .

1970 Senate Hrgs. 1512, *reprinted in* 2 *1970 Leg. History* 1207.

[40] Appearing before the Muskie Subcommittee after Veneman, Dr. Middleton continued to advocate the reasonable time idea: "So I make the plea that you consider the things that will bring about clean air rather than setting a date when this must be achieved, because the State capability, the fuel resources available, the state of the art of control techniques, the existence of natural or synthetic gas pipeline transmission systems, the Federal Power Commission's policy on using fuels environmental improvement [sic], and other factors have a bearing on compliance dates. Taking care of these things would allow clean air to be attained in a timely and realistic manner, rather than saying that, by some specific state, you have to do it." *1970 Senate Hrgs.* 1501-02, *reprinted in* 2 *1970 Leg. History* 1196-1197.

bill required that national standards had to be met within a statutory deadline of three years.[41]

Now industry and the Administration had reason to object, not over the issuance of a health-based national standard, but over substituting a fixed compliance date for a flexible one. Newly appointed HEW Secretary Elliot Richardson urged the Conference Committee to return compliance flexibility to the Act by providing him with an open-ended authority to extend the deadlines when "adequate control technology is not available and is not likely to be available." Letter from Secretary Richardson to Senator Randolph, Nov. 17, 1970, *reprinted in* 1 *1970 Leg. History* 211, 215.[42]

The Congress's "new philosophy" prevailed. The Conference reported a bill devoid of any connection between setting the primary NAAQS and considerations of costs and technological feasibility. The Administration

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[41] S. 4358, § 111(2)(A), *reprinted in* 1 *1970 Leg. History* 544. S. 4358 also provided for the possibility that a three judge federal court, upon petition from the Governor, and upon making specific findings, could extend the period for a year. Additional one year extensions were possible, upon the filing of a new petition each time. § 111(f), *reprinted in* 1 *1970 Leg. History* 550-553. In the final legislation, this was changed to a maximum two year extension if "the necessary technology or other alternatives are not available. . . . " § 110(e)(1)(A), P.L. 91-604, 84 Stat. 1676, 1682.

[42] *See also,* Letter of J.E. Swearingen, Std. Oil of Indiana, to Senator Jennings Randolph, Aug. 27, 1970 (opposing three year compliance time), 1 *1970 Leg. History* 782-83; Letter of James D. Kittelton to Richard Grundy, Committee on Public Works Staff Member, Aug. 26, 1970, 1 *1970 Leg. History* 716 (three year limit is "unreasonably short.").

and industry were undoubtedly disappointed in this outcome, but disappointment about the fixed deadlines cannot alter the significant and universal agreement reflected in the testimony of Under Secretary Veneman, Dr. Middleton and Mr. Tucker that the national minimum standard – now codified in the primary NAAQS – would be set at a health-based, criteria-based level.[43]

Subsequent to passage of the 1970 Act, the health-based, criteria-based nature of the primary NAAQS has since been confirmed numerous times, of which we will only provide a few examples. Of course, EPA has always said that its primary NAAQS responsibilities were limited to health considerations.[44]

[43] Confirming that the debate over compliance time had not altered the definition of the NAAQS, the description that Dr. Middleton gave of the primary NAAQS after their enactment was equivalent to the description he used prior to passage in explaining the administration's concept of national standards. *Compare*, John Middleton, Planning Against Air Pollution, 59 *American Scientist* 188, 189 (1971) ("These standards will be based on the criteria documents . . . To protect the public health, there will be national primary ambient air quality standards which will define how clean the air must be in order to be healthy to breathe.") *with 1970 Senate Hrgs.* 1512-13 (Middleton testifying that "setting a national air quality standard is a further step . . . declaring as a matter of national policy, that air quality in all places must be uniformly protective of health."), *reprinted in* 2 *1970 Leg. History* 1206-07.

[44] EPA's first administrator, William Ruckelshaus, summarized the law when he issued the first NAAQS, less than 4 months after the 1970 Amendments were enacted: "the Clean Air Act does not permit any factors other than health to be taken into account" in setting the NAAQS. 36 Fed. Reg. 8186 (1971).

Later in the 1970s, the provisions of the Act came under heavy pressure because they were indeed proving hard to comply with fully, and also because the country was suffering through recession and energy shortages. Congress extensively debated changes in the law and eventually made a number of mid-course corrections. During the thorough review that proceded the 1977 Amendments,

> the major challenge directed at the Act during the . . . oversight hearings [was] one dealing with the fundamental purpose of the law: to protect public health and welfare. At issue [was] whether the effects on public health of air pollutants should continue to represent the sole criterion for standard setting, . . . or whether, in view of events that occurred in the past 3 years, other elements that greatly affect national life and well being should now be included as valid criteria when standards are set and implemented.[45]

In explaining the legislative changes proposed by the Senate Environmental and Public Works Committee that had emerged from this review, Senator Domenici emphasized "one area of the law that the Committee refused to

[45] Congressional Research Service, A Summary of Clean Air Act Oversight Hearings, March 19, 20, April 20-24, 29-30, May 1, 13, 15, 20-21, 1975 at 5 (June 13, 1975), *reprinted in* Implementation of the Clean Air Act – 1975, Part I, *Hearings of the Subcommittee on Environmental Pollution of the Senate Committee on Public Works*, 94th Cong. 1st Sess. 5 (Serial No. 94-H10 1975).

alter. This was the national primary and secondary ambient air quality standards. These standards and the protection they offer to the public health and welfare are the linchpin of the Act."[46] Looking back on the 1970 Act in 1981, Senator Robert Stafford (R-VT), chairman of the Senate Environment and Public Works Committee, opened an oversight hearing by referring to the primary NAAQS as "health standards" that should continue in force as initially intended in 1970.[47] Overall, the primary NAAQS policy has been reviewed many times, always with the same results.

Also in 1981, a blue ribbon commission created by Congress in 1977 to undertake a thorough review of federal air policy returned its report to the Congress. It first conclusion was that "[t]he current statutory criteria and requirements for setting air quality standards at the levels necessary to protect public health without

[46] Pete V. Domenici, n.37, above, at 4507. He went on to note that "this left the deadlines as the major variable around which to structure [the Environment and Public Works Committee's] compromises." *Id.*

[47] Clean Air Act Oversight – Part 3, *Hearings Before the Senate Committee on Environment and Public Works*, 97th Cong. 1st Sess. 191 (Serial No. 97-H12, 1981) (remarks of Senator Stafford).

consideration of economic factors should remain unchanged."[48] And so they have.[49]

CONCLUSION

The decision of the Court of Appeals that EPA may only consider health effects when issuing the primary NAAQS should be affirmed.

Respectfully submitted,

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September 11, 2000

[48] National Commission on Air Quality, *To Breathe Clean Air* 55 (1981). Even Edwin Dodd, chairman of Owens Illinois and the industry representative on the Commission, agreed that the primary NAAQS were health-based and that this was a sound premise for the Act. *Id.*, at 320 (Supplemental Statement of Edwin Dodd) ("The Clean Air Act is built on a basis of NAAQS. The primary standards are set on the basis of protection of public health without consideration of economic factors. I can agree with this premise if it is clearly understood that in developing the various clean air programs necessary to meet these health standards, other goals of our society and economic practicality are considered in the implementation process.")).

[49] The briefs of Cross-Respondent American Lung Association and of *amici curiae* Environmental Defense, et al. provide additional post-enactment confirmation that the primary NAAQS are exclusively health- and criteria-based.

No. 99-1426

Supreme Court, U.S.
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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL DEFENSE, AMERICAN PUBLIC HEALTH ASSOCIATION, ET AL., ON BEHALF OF CROSS-RESPONDENTS

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September 11, 2000

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INTEREST OF *AMICI CURIAE*

Amici curiae Environmental Defense (formerly Environmental Defense Fund), American Public Health Association (the oldest and largest organization of public health professionals in the world), Clean Air Council, East Michigan Environmental Action Council, Environmental Law and Policy Center of the Midwest, Hoosier Environmental Council, Illinois Environmental Council, The Izaak Walton League of America, Legal Environmental Assistance Foundation, Michigan Environmental Council, Ohio Citizen Action, The Ohio Environmental Council, Physicians for Social Responsibility, Southern Environmental Law Center, Tennessee Environmental Council, and Valley Watch, are sixteen not-for-profit membership organizations working to improve public health and environmental quality throughout the United States. We seek healthier air quality on behalf of our thousands of members who live, raise families, and provide public health services in communities across the country that have air pollution concentrations in excess of the ozone and particulate matter standards under review in this case.[1]

SUMMARY OF ARGUMENT

Congress has effectively ratified the interpretation of the Environmental Protection Agency (EPA) that section 109(b) of the Clean Air Act precludes the consideration of

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. This brief is being filed with the written consent of the parties, and the corresponding documentation is simultaneously being filed with the Court.

costs in setting the National Ambient Air Quality Standards (NAAQS). Throughout the nearly 30 years in which the agency has consistently applied this interpretation, both supporters and opponents have brought it repeatedly to Congress' attention. Congress considered and rejected a number of bills that would have permitted or required costs to be taken into account in setting the NAAQS. It also reenacted the Clean Air Act on two occasions in which it made sweeping changes to the statute but left section 109(b) unchanged. The cross-petitioners and their supporters are attempting to win before the Court a battle that they have lost repeatedly before Congress.[2]

Moreover, the cross-petitioners seek to have the Court depart from the long-standing and consistent judicial interpretation that section 109(b) bars the consideration of costs in setting the NAAQS, which was first adopted by the D.C. Circuit in *Lead Industries Ass'n* v. *EPA*, 647 F.2d 1130, 1148-52 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). The principle of *stare decisis* applies in this case because the D.C. Circuit has exclusive venue over challenges under section 109(b) and has consistently followed *Lead Industries*, and because *Lead Industries* itself followed the interpretive framework set forth by the Court in *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256-58 (1976). The failure to apply *stare decisis* would create massive additional work for EPA and the states, and would greatly affect the settled expectations of the regulated community and the public.

The statutory arguments advanced by the cross-petitioners are convoluted, implausible, and without merit. Their supporters also urge the Court to adopt a cost-

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[2] This brief does not review the congressional intent expressed in the 1970 Clean Air Act because it will be discussed at length in the briefs of other supporters of EPA's interpretation.

benefit canon of interpretation, which, in *Lochner*-like fashion, would attribute to all federal legislative activity a uniform normative goal. The application of such a canon to the Clean Air Act would upset the carefully crafted congressional compromise in which costs are irrelevant to the setting of the NAAQS but highly relevant to when and how the NAAQS will be attained. Finally, the cross-petitioners advance an interpretation of the term "public health" that is inconsistent with the congressional understanding of this concept.

ARGUMENT

I. CONGRESS HAS EFFECTIVELY RATIFIED EPA'S INTERPRETATION THAT COSTS CANNOT BE TAKEN INTO ACCOUNT IN SETTING THE NAAQS

A. The Court's Recent Decision in *Brown & Williamson* Compels Upholding EPA's Interpretation

The Court should uphold EPA's long-standing interpretation that costs cannot be taken into account in setting the NAAQS. See Part I.B, *infra*. Only last Term, in *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), the Court concluded that "Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction . . . to regulate tobacco products." *Id.* at 1307. In reaching this conclusion, the Court noted that Congress had adopted various statutes regulating tobacco "against the backdrop of the FDA's consistent and repeated statements that it lacked authority" to do so. *Id.* at 1306-07. It also noted that over the years "Congress considered and rejected bills that would have granted the FDA such jurisdiction." *Id.* at 1307.

As discussed in Part I.C, *infra*, the parallels with this case are striking. Here, too, Congress adopted important

statutory provisions "against the backdrop of" a substantial and consistent agency interpretation. Indeed, the 1977 and 1990 amendments to the Clean Air Act modified the programs governing the implementation of the NAAQS rather than change the manner in which the NAAQS are set. EPA's interpretation was also "brought to Congress' attention through legislation specifically designed to supplant it," *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985), including the proposals by industry groups in 1977 and 1981, the regulatory reform bills that have been introduced since 1995, and the specific bills seeking to amend the Clean Air Act introduced in 1996 and 2000.

B. EPA Has a Long-standing and Consistent Interpretation of Section 109(b)

EPA first took the position that section 109(b) bars the consideration of costs in 1971, when it adopted the first six NAAQS. See 36 Fed. Reg. 8186 (1971) ("[T]he Clean Air Act . . . does not permit any factors other than health to be taken into account in setting the primary standards."). The agency repeatedly has reaffirmed this interpretation:

> Section 109(b) of the Act specifies that [NAAQS] are to be based on scientific criteria relating to the level that should be attained to adequately protect public health and welfare. Considerations of cost of achieving those standards . . . are not germane . . . , as the words of the Act and its legislative history clearly indicate.

45 Fed. Reg. 55,067 (1980); see also 43 Fed. Reg. 26,963 (1978); *id.* at 46,247; 44 Fed. Reg. 8203 (1979). In the regulatory proceedings currently under review, EPA stated: "For more than a quarter of a century, EPA has

interpreted section 109 of the Act as precluding consideration of . . . economic costs . . . " 62 Fed. Reg. 38,683 (1997); *id.* at 38,878.

C. Congress Has Legislated Against the Backdrop of EPA's Interpretation and Repeatedly Has Rejected Overturning this Interpretation

1. The 1977 Amendments

Congress amended the Clean Air Act extensively in 1977 (the amendments take up 111 pages in the Statutes at Large, see Pub. L. 95-95, 91 Stat. 685, 685-796 (1977)) but left section 109(b) unchanged even though the manner in which EPA set the NAAQS received sustained congressional attention.

Perhaps the most important decision before Congress in 1977 was how to deal with the fact that large portions of the country had failed to meet the NAAQS even though the 1970 statute had contemplated that the primary NAAQS would be achieved throughout the country by 1975. See 42 U.S.C. §§ 1857c-4, 1857c-5 (amended 1977). One approach could have been to weaken the NAAQS in areas that had trouble meeting these standards – an approach that would have required an amendment of section 109(b). See *Lead Industries*, 647 U.S. at 1150 (discussing efforts by industry representatives to urge Congress to "[r]evise section 109 . . . to include allowance for the consideration of social and economic factors in the definition of 'health' and 'welfare.' "). Congress, however, left section 109(b) unchanged and instead extended the deadlines for achieving the standards to 1982 and, in some instances, to 1987. 42 U.S.C. § 7502(a)(1)-(2) (amended 1990).

Congress also debated the merits of the NAAQS in the crafting of a program for the Prevention of Significant Deterioration (PSD) of air quality in areas meeting the NAAQS. See 42 U.S.C. §§ 7470-7492. Congress faced the

question whether areas that had better air quality than the NAAQS would be subject to standards more stringent than the NAAQS. Despite extensive congressional discussion concerning the NAAQS, the relevant committee reports do not suggest that the NAAQS were too stringent because they were set without taking costs into account. Quite to the contrary, the Report of the House Committee on Interstate and Foreign Commerce found that the NAAQS were insufficiently protective, and that it was therefore desirable to have more stringent standards in areas that were already meeting the NAAQS. See H.R. Rep. 95-294, at 103-28 (1977). In fact, the Report noted that "all indicators point to the likely necessity for tightening the ambient air quality standards to protect public health." *Id.* at 127. Thus, Congress retooled the air quality management programs both for areas failing to meet the NAAQS and for areas achieving the NAAQS, but did not modify the provisions in section 109(b) governing how EPA set the NAAQS.

2. Further Consideration in the 1980s

The 1977 amendments established the National Commission on Air Quality, which included the leaders of the congressional committees with oversight responsibilities for the Clean Air Act (Sens. Hart and Stafford, and Reps. Broyhill and Dingell). The Commission was asked to "make an independent analysis of air pollution control and alternative strategies for achieving the goals of the Act." See The National Commission on Air Quality, *To Breathe Clean Air* vii (1981). In its final report, the Commission made numerous recommendations for amendments to Congress, but its first recommendation was to retain the Act's prohibition on the consideration of costs in setting the NAAQS: "The current statutory criteria and requirements for setting air quality standards at the levels

necessary to protect public health without consideration of economic factors should remain unchanged." *Id.* at 55.

The Commission's recommendation was debated in oversight hearings held in 1981. For example, the Business Roundtable proposed that section 109(b) be amended to require the Administrator "to consider the nature and extent of the risk, attainability of the standard, economic values, and other public interests." *Clean Air Oversight: Hearings Before the Senate Comm. on Environment and Public Works*, 97th Cong., Part 3, at 505 (1981). George Eads, one of the signatories of the *amicus* brief filed by a group of economists in this case, harshly characterized the setting of NAAQS without taking costs into account as "an elaborate charade that does not serve the public well." *Id.* at 200. Senator Hart, the Commission's Chairman, strongly objected to Eads' characterization: "[W]hat you describe as an elaborate charade was the product of very extensive deliberation on the part of the Congress of 1970, received almost 3 years of deliberation on the part of the Congress that acted in 1977, was reviewed for almost 3 years by the National Commission on Air Quality and was sustained by that Commission." *Id.* at 214.

Similarly, Senator Chafee expressed misgivings about the "insertion of an added element, namely consideration of the cost-benefit test." *Id.* at 212. A number of other Senators indicated that costs could not be taken into account in setting the primary NAAQS. See, *e.g.*, *id.* at 202 (Sen. Stafford); *id.* at 209 (Sen. Gorton).

Later in 1981, in connection with possible amendments to the Clean Air Act, the Senate Committee on Environment and Public Works unanimously agreed in a straw vote not to change the manner in which the primary standards were set. See 12 *Env't Rep.* (BNA) 835 (1981). An industry group supported this outcome, noting that "primary standards should continue to be based

on health factors," though it urged that "economic factors" should be made relevant to the secondary standards. See *id.* at 766. This group included representatives of the U.S. Chamber of Commerce and the National Association of Manufacturers, which now urge the Court to hold that costs must be taken into account in setting the primary standards.

3. The 1990 Amendments

In 1990, as in 1977, Congress left section 109(b) unchanged despite statutory amendments that take up 314 pages in the Statutes at Large. See Pub. L. 101-549, 104 Stat. 2399, 2399-2712 (1990). Both the floor debates and the congressional reports, however, discussed the prohibition on considering costs in setting the primary NAAQS. See, *e.g.*, 136 Cong. Rec. H12,885 (daily ed. Oct. 26, 1990) (Rep. Swift) ("They are not cost-benefit standards. They are absolute standards."); 136 Cong. Rec. S16,896 (daily ed. Oct. 27, 1990) (Sen. Moynihan) ("The cost of meeting these standards was not to be considered."); S. Rep. 101-228, at 5 (1989) (" '[P]rimary' ambient air quality standards limit the maximum allowable concentration of each criteria pollutant . . . without regard to the economic or technical feasibility of attainment."); see also S. Rep. 100-231, at 251 (1987) (referring to disallowance of cost considerations under section 109(b)). One opponent of the proposed amendments, Representative Dannemeyer, introduced into the *Congressional Record* a study complaining that "benefits and costs" could not be taken into account in setting the NAAQS. 136 Cong. Rec. H12,916 (daily ed. Oct. 26, 1990); see *id.* at H12,912-15.

Moreover, in 1990, Congress again faced the problem of how to deal with areas that had not met the NAAQS. As in 1977, the 1990 Congress could have weakened the NAAQS in order to make attainment easier but chose to leave unchanged the method for setting the NAAQS and

instead to extend the attainment deadlines. See, *e.g.*, 42 U.S.C. § 7511(a)(1).

4. Bills to Amend Section 109(b)

In hearings held in 1995, Mary Nichols, EPA's Assistant Administrator for Air and Radiation, testified that "the Clean Air Act has always required the EPA not to take costs into consideration when setting the national ambient air quality standards." *Clean Air Act Amendments: Joint Hearing Before the Subcomms. on Oversight and Investigations, and on Health and Environment, House Comm. on Commerce*, 104th Cong., at 126 (1995). Representative Barton then introduced the Clean Air Act Amendments of 1996, which would have required that "the incremental costs" of the NAAQS must not exceed their "incremental benefits." See H.R. 3519, 104th Cong., 2d Sess. § 13 (1996). The Barton bill was never reported out of committee.

In the 106th Congress, Senator Voinovich introduced the Air Quality Standard Improvement Act of 2000, which would require EPA to consider cost-benefit analysis in setting the NAAQS. See S. 2362, 106th Cong., 2d Sess. (2000). That bill has not been reported out of committee. Thus, the specific legislative initiatives to amend the manner in which the NAAQS are established under section 109(b) have been unsuccessful.

5. Regulatory Reform Efforts Beginning in the 104th Congress

Section 109(b)'s prohibition on the consideration of costs was the subject of extensive congressional attention in the debates over regulatory reform bills that would have required cost-benefit analysis for many federal regulations. In the 104th Congress, there were two principal vehicles for these efforts: H.R. 9, 104th Cong., 1st Sess. (1995) and S. 343, 104th Cong., 1st Sess. (1995). See also S. 291, 104th Cong., 1st Sess. (1995).

During the House debates on an earlier version of H.R. 9, for example, Representative Beilenson complained:

> Particularly troubling is the fact that the bill's decision criteria for issuing rules would supercede such requirements in existing health, safety, and environmental laws. By applying these new requirements to such laws as the Clean Air . . . Act[ ], this legislation threatens to overturn the important health protections citizens have under those laws.

141 Cong. Rec. H2235 (daily ed. Feb. 27, 1995). Similarly, Representative Brown noted that "the bill overrides . . . provisions of existing law," including the Clean Air Act. *Id.* at H2241.

Representative Boehlert offered an amendment, with bipartisan support, to restrict the bill's reach: "Nothing in this Act shall be construed to modify any statutory standard or requirement . . . " *id.* at H2357 (daily ed. Feb. 28, 1995), and members noted its impact on the Clean Air Act, see *id.* at H2361 (Rep. Morella); *id.* at H2364 (Rep. Waxman). The amendment was defeated and the bill passed the House, *id.* at H2365-66, 2638-39, but was never voted on by the Senate.

In the Senate, a number of Senators on the Committee on the Judiciary complained about the impact of S. 343 on statutes such as the Clean Air Act:

> S. 343 contains what has been called a "supermandate." It creates supplementary decisional criteria for every agency action that permits the cost factors to trump safety factors in statutes in which Congress intended that safety should be the primary consideration. Without acknowledgment, the bill's supplementary decisional criteria effectively would amend the carefully considered criteria now in place in such landmark laws as . . . the Clean Air Act . . .

S. Rep. 104-90, at 135 (1995) (additional views of Senators Biden, Kennedy, Leahy, Simon, Kohl, and Feingold); see also *id.* at 130, 136. Witnesses in committee hearings raised similar complaints. See, *e.g.*, *Regulatory Reform: Hearings Before the Senate Comm. on Governmental Affairs*, 104th Cong., at 495 (1995).

In response to these concerns, the Senate amended the bill with bipartisan support to eliminate the supermandate, by providing: "Nothing in this section shall be construed to override any statutory requirement, including health, safety, and environmental requirements." 141 Cong. Rec. S9695 (daily ed. July 11, 1995). The bill as amended failed to survive a cloture vote. See *id.* at S10,399.[3]

6. Oversight Hearings in Connection with the Proposal and Promulgation of the Challenged NAAQS for Ozone and Particulate Matter

Following EPA's proposal of the NAAQS for ozone and particulate matter (PM) that are at issue in this case, Congress held a number of oversight hearings on the Clean Air Act in which EPA officials highlighted EPA's practice of not considering costs when setting the NAAQS. For example, Carol Browner, the EPA Administrator, stated in both Senate and House hearings that "[t]hroughout the 25-year history of the Clean Air Act . . . [c]osts of meeting the standards and related factors have never been considered in setting the national

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[3] A number of bills requiring cost-benefit analyses of significant federal regulations were introduced in the 105th and 106th Congresses, but none reached either the House or Senate floor for a vote. See, *e.g.*, H.R. 1704, 105th Cong., 1st Sess. (1997); H.R. 4085, 105th Cong., 2d Sess. (1998); H.R. 4162, 105th Cong., 2d Sess. (1998); H.R. 4863, 105th Cong., 2d Sess. (1998); S. 981, 105th Cong., 1st Sess. (1997).

ambient air quality standards themselves." *Clean Air Act: Ozone and Particulate Matter Standards: Hearings Before the Senate Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety and the Senate Comm. on Environment and Public Works*, 105th Cong., Part 1, at 282 (1997) [*1997 Senate Environment Hearings*]; *EPA's Particulate Matter and Ozone Rulemaking: Is EPA Above the Law?: Hearings Before the Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs, House Comm. on Government Reform and Oversight*, 105th Cong., at 380 (1997) [*1997 House Government Reform Hearings*]; see *Implementation of the Clean Air Act National Ambient Air Quality Standards (NAAQS) Revisions for Ozone and Particulate Matter: Joint Hearing Before the Subcomm. on Health and Environment and the Subcomm. on Oversight and Investigations, House Comm. on Commerce*, 105th Cong., at 21 (1997).

EPA Deputy Administrator Fred Hansen testified that "Congress directed EPA to set what are known as 'primary standards' to protect public health without consideration of cost." *EPA's Rulemakings on the National Ambient Air Quality Standards for Particulate Matter and Ozone: Hearing Before the Subcomm. on Commercial and Administrative Law, House Comm. on the Judiciary*, 105th Cong., at 22 (1997) [*1997 Senate Judiciary Hearings*].

Similarly, Mary Nichols, EPA's Assistant Administrator for Air and Radiation, testified that EPA's practice of not taking costs into account in setting the NAAQS had been followed "through six Presidential administrations and 14 Congresses." 1997 *Senate Environment Hearings*, Part 2, at 203; *Review of EPA's Proposed Ozone and Particulate Matter NAAQS Revisions: Joint Hearings Before the Subcomm. on Health and the Environment and the Subcomm. on Oversight and Investigations, House Comm. on Commerce*, 105th Cong., Part 1, at 160 (1997) [*1997 House Commerce Hearings*].

Witnesses supporting and opposing the revised ozone and PM standards testified that the Clean Air Act

required the NAAQS to be set without taking costs into account. See, *e.g.*, *1997 Senate Judiciary Hearings*, at 68 ("These standards must be established by relying on health based criteria only; that is very specific in the Clean Air Act"); *1997 House Commerce Hearings*, Part 1, at 53 ("[I]t is unfortunate that the Clean Air Act prohibits the consideration of cost in setting the standard."); *1997 Senate Environment Hearings*, Part 2, at 162 ("EPA interprets the Clean Air Act to prohibit the consideration of costs in setting NAAQS."); *1997 House Government Reform Hearings* at 284 ("As required by Congress, EPA is to set . . . the ozone and PM standards at levels that are protective of the public health without basing its decision on the costs of complying with those standards.").

Moreover, members of Congress acknowledged that under the law costs could not be taken into account in setting the NAAQS. See, *e.g.*, *1997 House Commerce Hearings*, Part 2, at 260 ("The law says that EPA must set standards based solely upon human health considerations.") (Rep. Pallone). In the end, a bill that would have reinstated the previous ozone and PM standards did not reach the Senate floor for a vote. S. 1084, 105th Cong., 1st Sess. (1997).

D. The Court Should Not Be Used to End-Run the Political Process

There currently is dissension in Congress on the role that costs should play in setting the NAAQS. The variety of views are illustrated by a recent subcommittee hearing that marked the beginning of a new effort to reauthorize the Clean Air Act. See *Clean Air Act: Review and Oversight: Hearing Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety, Senate Comm. on Environment and Public Works*, 106th Cong. (1999). Senator Inhofe complained that the Clean Air Act "is chasing after pennies of benefits for dollars in costs through its failure to identify

the most cost-effective risks." *Id.* at 2. Senator Voinovich announced that he would introduce a bill requiring the use of cost-benefit analysis under section 109(b). *Id.* at 3.

In contrast, Senator Baucus stated: "[D]eveloping clean air standards does not lend itself easily to cost-benefit analysis . . . I challenge anyone to put a dollars and cents value on a child's reduced IQ due to exposure to lead." *Id.* at 6. Senator Lieberman expressed "words of caution on the issue of applying cost-benefit analysis to the Clean Air Act" and spoke critically of telling "the public that we can't let them know whether the air is clean enough to breathe because the standard doesn't meet a cost-benefit test." *Id.* at 8-9.

Perhaps the proponents of cost-benefit analysis eventually will prevail before Congress as they did in 1996 with respect to the amendments of the Safe Drinking Water Act (SDWA). See 42 U.S.C. § 300g-1(b)(4)(C), (6)(A). But if advocates of cost-benefit analysis do prevail in Congress it is likely to be as part of a package in which some of the competing concerns of other interests also are addressed, as was the case under the SDWA. See *id.* § 300g-1(b)(1)(C) (requiring EPA to take account of the interests of sensitive subgroups); *id.* § 300g-3(c)(4) (requiring the provision of information to consumers).

The cross-petitioners and various *amici* are seeking to win a victory from the Court that they have not been able to achieve in Congress despite extensive efforts over two decades. See Part I.C, *supra*. They are also trying to obtain this victory in a manner that does not require any competing compromises, as invariably would occur in the give-and-take of the legislative process. So are some Senators who have so far been unsuccessful at obtaining the passage of the legislation that they favor: two of the four senators who co-sponsored the recent Senate bill that would require cost-benefit analysis in the setting of the NAAQS, see Part I.C.4, *supra*, and two of the leading advocates of the failed regulatory reform bills in the

104th Congress, see Part I.C.5, *supra*. See Am. Br. of Sen. Inhofe *et al.* 5-17; Am. Br. of Sen. Hatch and Rep. Bliley. Were they to prevail here they would be denying the public a full and fair consideration of the host of political, technical and intellectual issues that must be aired and resolved in this policy debate: an airing and resolution that only Congress can provide. The Court should not allow itself to be used for such an end-run around the political process.

II. THE PRINCIPLE OF *STARE DECISIS* CALLS FOR FOLLOWING THE LONG-STANDING JUDICIAL DETERMINATION THAT COSTS CANNOT BE TAKEN INTO ACCOUNT IN SETTING THE NAAQS

A. In a Body of Case Law Issued Over the Past Twenty Years, the D.C. Circuit Has Consistently Held that Costs Cannot Be Taken Into Account in Setting the NAAQS

EPA's interpretation that costs cannot be taken into account in setting the NAAQS was first affirmed by the D.C. Circuit in 1980. See *Lead Industries*, 647 F.2d at 1148 ("[T]he statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109.").

The D.C. Circuit, which has exclusive venue over the review of NAAQS, see 42 U.S.C. § 7607(b)(1), reaffirmed *Lead Industries* in cases reviewing various NAAQS. See *API* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982) ("API's argument that the Administrator erred in not considering attainability and cost justifications for the ozone standards was specifically rejected in the *Lead Industries* case."); *NRDC* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991) ("Under § 109 . . . the Administrator may not

consider cost and technological feasibility."); see also *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998) (NAAQS must be set "without reference to cost or technological feasibility"). The court below thus simply followed a long line of consistent precedent in holding that "in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards." Pet. App. 19a.

B. The Principle of *Stare Decisis* Applies in this Case

As Justice Stevens observed in a recent plurality opinion joined by Justices Ginsburg and Breyer, the principle of *stare decisis* comes into play when the Court confronts a clear body of law fashioned by the courts of appeals. See *Hubbard* v. *United States*, 514 U.S. 695, 712-13 (1995) (plurality opinion); see also *United States* v. *Ryan*, 284 U.S. 167, 174 (1931) ("[W]e should hesitate to set aside, at this late date, the uniform construction given . . . by the lower federal courts . . . "). Justice Stevens noted that following precedents of the lower courts "serves . . . one of the central purposes of *stare decisis*: promoting 'stability and certainty in the law.' " *Hubbard*, 514 U.S. at 713 n.13.

This case presents an even more compelling claim for *stare decisis* than *Hubbard* because here following the long-standing and consistent lower court approach does not require overruling a prior Supreme Court precedent. Thus, the concerns about invoking *stare decisis* expressed by the three dissenting Justices in *Hubbard* are not present here. See *id.* at 721 (Rehnquist, C.J., joined by O'Connor and Souter, JJ., dissenting).

Quite to the contrary, *Lead Industries* followed the Court's own approach to the interpretation of the Clean Air Act. In *Union Electric Co.*, 427 U.S. at 253-54, the petitioners argued that EPA was required to consider

economic and technological feasibility in deciding whether to approve State Implementation Plans (SIPs) under section 110 of the Clean Air Act. The Court held that EPA could not rely on factors other than those listed in section 110(a)(2). *Id.* at 257. Similarly, the D.C. Circuit in *Lead Industries* held that, in setting the NAAQS, EPA could not rely on factors other than those set forth in section 109(b). Moreover, the Court in *Union Electric* stated that, under the Clean Air Act, "[w]here Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Id.* at 257 n.5. Relying on *Union Electric*, the D.C. Circuit used nearly identical language in *Lead Industries*. See 647 F.2d at 1148-49 & n.37. Other opinions have recognized the close links between the interpretive approaches of the two cases. See, *e.g.*, *NRDC* v. *EPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (*en banc* opinion by Bork, J.) ("*Vinyl Chloride*"); *Union of Concerned Scientists* v. *NRC*, 824 F.2d 108, 114-15 (D.C. Cir. 1987).

None of the special circumstances that might justify a departure from a *stare decisis* approach are present here. In particular, no "intervening development of the law" has "removed or weakened the conceptual underpinnings from the prior decision." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989). The continuing vitality of *Lead Industries* is underscored by the D.C. Circuit's reliance on this case in interpreting other statutory provisions. See *Union of Concerned Scientists*, 824 F.2d at 114 (relying on *Lead Industries* and *Union Electric* to hold that "economic costs" may not be considered under provision of the Atomic Energy Act); *Vinyl Chloride*, 824 F.2d at 1158-59 (en banc opinion by Bork, J.) (analyzing implications of *Lead Industries* and *Union Electric* for the interpretation of section 112 of the Clean Air Act). There is no merit in the cross-petitioners' suggestion that subsequent decisions of the Court "negate the premises on which *Lead Industries* is predicated," as none of the cases on which they rely deal

with the Clean Air Act, the consideration of costs under environmental statutes, the use of cost-benefit analysis, or are otherwise relevant. Cross-Pet. Br. 28, 31-32.

Moreover, this case does not raise the issue that led the Court to reject *stare decisis* in *Dickinson* v. *Zurko*, 527 U.S. 150 (1999), over the dissent of three Justices, see *id.* at 171 (Rehnquist, C.J., joined by Kennedy and Ginsburg, JJ., dissenting). The Court's concern in *Zurko* was that because the Federal Circuit's standard of review over decisions of the Patent and Trademark Office was different from the standard under the Administrative Procedure Act (APA), applying *stare decisis* would make it too easy for other agencies to depart from the requirements of the APA. See *id.* at 162. In this case, following the *Lead Industries* approach would not have a negative impact on other statutes.

C. This Case Presents Particularly Compelling Arguments in Favor of the Application of *Stare Decisis*

In *Patterson*, 491 U.S. at 172, the Court emphasized that "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction," as is the case here. Even in constitutional cases, where the possibility of congressional correction is absent, "the principles of *stare decisis* weigh heavily against overruling" precedents. *Dickerson* v. *United States*, 120 S. Ct. 2326, 2336 (2000).

The principle of *stare decisis* has particular force where abandoning precedent "would dislodge settled rights and expectations." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Departing from *Lead Industries* would do far more than simply set aside the revisions to the NAAQS for ozone and PM that were challenged below. It could also mean that all the other

NAAQS would have to be revised at the time of their five-year review, see 42 U.S.C. § 7409(d)(1), even if no new information arose concerning the adverse health effects of the respective contaminants.

In turn, such revisions of the NAAQS would give rise to the need for states to submit new SIPs and, consequently, to impose new limitations on their stationary sources. See 42 U.S.C. § 7410(a)(1)-(2). Furthermore, thirty years of settled air quality management policies in communities across the country would be called into question.

The result would be massive additional work for EPA and the states. The change in interpretation also would greatly affect the settled expectations of the regulated community and the public. Investments in pollution control equipment could be rendered worthless by changes in the standards. In sum, the factors that call for a heightened application of the principle of *stare decisis* are present here.

D. A Policy Change of this Magnitude Cannot be Made by the Judiciary Without Seriously Disrupting the Nation's Efforts to Control Air Pollution

The dislocations that would come from failing to follow *stare decisis* underscore why policy changes of the magnitude proposed by the cross-petitioners ought to be made, if at all, by Congress and not by the judiciary. If Congress were to decide that costs should be taken into account in setting the NAAQS, it could establish rules ensuring an orderly transition to a new regime. For example, Congress might decide, as it did in its 1996 amendments to the SDWA, to require cost-benefit analysis only if EPA seeks to strengthen standards. See 42 U.S.C. § 300g-1(b)(3)-(6), (9)). Thus, the transition to the use of cost-benefit analysis did not affect the existing standards.

The judiciary, unlike Congress, does not have the flexibility to fashion finely textured rules of this sort. Its only available instrument – a judicial reinterpretation of section 109(b) – is overly blunt, and would lead to considerable disarray in the implementation of the Clean Air Act.

III. THE CHALLENGES TO EPA'S INTERPRETATION OF SECTION 109(b) ARE WHOLLY UNPERSUASIVE

A. The Cross-Petitioners' Arguments Concerning Sections 108 and 109 Are Without Merit

First, the cross-petitioners note that the criteria published pursuant to section 108(a)(2) must contain information not only concerning public health, but also concerning public welfare. See 42 U.S.C. § 7408(a)(2). Then, they point out that public welfare is defined in the statute to include effects "on economic values and on personal comfort and well-being." *Id.* § 7602(h). From this, they conclude that economic values must be taken into account in setting the primary NAAQS. See Cross-Pet. Br. 37-39.

The flaw with this argument is that it is the secondary NAAQS – not the primary NAAQS – that are set to protect against adverse effects on public welfare. The definition of public welfare is irrelevant to the setting of the primary standards, which must "protect the public health." 42 U.S.C. § 7409(b)(1).

Second, the cross-petitioners argue that just because the primary NAAQS must be "based on" the air quality criteria promulgated under section 108, see 42 U.S.C. § 7409(b)(1), does not mean that they must be based *only* on the criteria. Cross-Pet. Br. 39. For the cross-petitioners to prevail, however, the statute would have to say that the NAAQS *must* be based on factors other than those

included in the criteria, and, more particularly, that they must be based on the costs of compliance. Without that, the cross-petitioners do not have an affirmative counterweight to the clear meaning of the 1970 legislation, the congressional reaffirmation of EPA's interpretation, the doctrine of *stare decisis*, or the deference owed to the long-standing administrative construction.

Third, the cross-petitioners take issue with EPA's view that the section 108 "criteria" are compilations of scientific information about a pollutant's adverse health effects. Cross-Pet. Br. 39. The dictionary definition on which cross-petitioners rely cannot override the statutory command that "[a]ir quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare." 42 U.S.C. § 7408(a)(2).

Fourth, the cross-petitioners argue that the NAAQS cannot be set solely by reference to the criteria because the agency is commanded to consider the comments submitted in the rulemaking. Cross-Pet. Br. 39-40. But there is no plausible scenario under which the requirement that the agency consider comments could modify the standards defined in the statute for the setting of the NAAQS.

Fifth, the cross-petitioners focus on section 108(b)(1), which requires the Administrator to provide states with information about air pollution control techniques, including "data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology." 42 U.S.C. § 7408(b)(1). The cross-petitioners argue that the statute requires the Administrator to provide this information so that states can "criticize EPA's consideration of compliance costs in NAAQS standard setting proceedings," rather than so that they can begin

preparing their strategies for attaining the NAAQS. Cross-Pet. Br. 40.

The only evidence that the cross-petitioners adduce for this bizarre proposition is that the states receive this information "at least three or four years" before "they begin planning compliance with a revised NAAQS." *Id.* The statute, however, does not contemplate such an extended time frame. Indeed, EPA must issue the information "simultaneously" with the publication of proposed NAAQS, and must promulgate final NAAQS no later than 90 days after the proposal. See 42 U.S.C. § 7409(a)(1)(B), (a)(2). The states must submit SIPs for EPA's approval within 3 years of the promulgation of the NAAQS, and before this submission they must provide "reasonable notice" and conduct "public hearings." *Id.* § 7410(a)(1). So, under the statutory time frame, states must "begin planning" for their SIPs soon after the NAAQS are promulgated.

Sixth, the cross-petitioners find support for the view that NAAQS must take into account economic considerations in section 109(d), which sets forth the role of the Clean Air Scientific Advisory Committee (CASAC). Cross-Pet. Br. 41. CASAC's principal function is to review at five-year intervals the criteria and NAAQS for the various pollutants. See 42 U.S.C. § 7409(d)(2)(B). But CASAC also is required to advise the Administrator on a number of other matters, including on "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such [NAAQS]." *Id.* § 7409(d)(2)(C)(iv). The legislative history explains the purpose of this provision: "[T]his advice may be of interest and assistance to the States and to Congress in fashioning future legislation." H.R. No. 95-294, at 183 (1977).

The cross-petitioners insist, nonetheless, that this cannot in fact be the purpose of section 109(d) because the information on compliance costs is given to the

Administrator and not to the states. The cross-petitioners overlook, however, that EPA has a statutory obligation under section 108(b)(1) to provide such information to the states. See 42 U.S.C. § 7408(b)(1).

The cross-petitioners attempt to bolster their argument by referring to section 307(d)(3), which requires EPA, when it proposes a NAAQS, to "provide a reference to any pertinent findings, recommendations, and comments" by CASAC, and to explain the reasons for important departures from these recommendations. *Id.* § 7607(d)(3). But the statute makes clear that this obligation attaches only to "pertinent" CASAC materials. The advice under section 109(d)(2)(C)(iv) is simply not "pertinent" to the setting of the NAAQS.

B. The Court Should Decline the Invitation to Adopt a Cost-Benefit Canon of Statutory Interpretation

Amicus General Electric urges the Court to adopt an interpretive canon that would attribute to all federal legislative activity a uniform normative goal: cost-benefit analysis. *Cf. College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) ("We had always thought that the distinctive feature of *Lochner*, nicely captured in Justice Holmes' dissenting remark about 'Mr. Herbert Spencer's Social Statics,' was that it sought to impose a particular economic philosophy upon the Constitution."). The Court is asked to take this course of action despite the deep divisions that cost-benefit analysis engenders in the political process. See Parts I.C.5, I.D, *supra*. Regardless of what the Court might think of such a "*Lochner* for the administrative state," this case provides a poor vehicle for considering the question.

1. Such a Canon Could Not Override the Evidence of Congressional Intent or the Deference Owed to EPA Under *Chevron*

The cost-benefit canon is irrelevant to the disposition of this case. The canon cannot override the clear meaning of the 1970 legislation, the congressional reaffirmation of EPA's interpretation, or the doctrine of *stare decisis*. Moreover, the Court's endorsement of the cost-benefit canon could have no impact on the disposition of this case because "policy oriented canons of statutory construction" cannot trump the *Chevron* deference owed to EPA's interpretation. *Ober United Travel Agency, Inc.* v. *Department of Labor*, 135 F.3d 822, 825 (D.C. Cir. 1998); see *Amex Land Co.* v. *Quarterman*, 181 F.3d 1356, 1362 (D.C. Cir. 1999) ("canons that embody a policy choice and should not be employed by a reviewing court at *Chevron* step I or II"); *Michigan Citizens for an Indep. Press* v. *Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir.), *aff'd by an equally divided Court*, 493 U.S. 38 (1989) (same).

2. The Court Must Respect the Manner in Which Congress Has Taken Costs into Account in the Clean Air Act

A cost-benefit canon has no role to play under the Clean Air Act, where Congress paid close attention to where and how costs should be considered and traded off against health benefits. The NAAQS are aggregate measures of the permissible concentration of pollutants in the ambient air, which do not directly constrain the activities of any polluter. Costs are directly relevant, however, to when and how the NAAQS will be met through the regulation of individual polluters. For example, the federal emission limitations are highly sensitive to the costs imposed on regulated firms. The New Source Performance Standards (NSPS), which apply to new stationary sources, must "tak[e] into account the costs of achieving

[the] reduction." 42 U.S.C. § 7411(a)(1). The Best Available Control Technology (BACT) standards, which apply to large new sources in areas meeting the NAAQS, must "tak[e] into account energy, environmental, and economic impacts and other costs." *Id.* § 7479(3). Reasonably Available Control Technology (RACT) standards, which apply to existing sources in areas out of compliance with the NAAQS, must take into account "[t]he social, environmental, and economic impact of such controls." 40 C.F.R. § 51.100(o)(2). Similarly, in determining whether to prescribe more stringent standards for mobile sources, the Administrator must consider whether further emission reductions would be "cost-effective." 42 U.S.C. § 7521(i)(3)(A)(iii). In other parts of the statute, Congress has deliberately employed cost-reducing strategies, such as the emissions allowance and trading program to address acid rain. 42 U.S.C. §§ 7651-7651o.

Furthermore, in its amendments to the Clean Air Act, Congress has shown a keen interest in avoiding excessive economic dislocations. Most importantly, while the 1970 Clean Air Act contemplated that the NAAQS for all pollutants would be met, nationwide, by around 1975, Congress extended the attainment deadlines in the 1977 and 1990 amendments. See Part I.C.1, I.C.3. For ozone, for example, the NAAQS do not need to be met in certain parts of the country until 2010. See 42 U.S.C. § 7511(a)(1). In addition, Congress has provided more targeted relief in a variety of instances. See, *e.g.*, Pub. L. 97-23, § 2, 95 Stat. 139, 139 (1981) (extending compliance deadlines for iron and steel facilities); 42 U.S.C. § 7419 (providing waiver for copper smelters in 1977).

The Clean Air Act accordingly consists of a carefully crafted congressional compromise in which costs are irrelevant to the setting of the NAAQS but highly relevant to when and how the NAAQS will be attained. The application of a cost-benefit canon would impermissibly upset this compromise.

C. The Challengers Rely on a Number of Irrelevant Generalities and Inapposite Provisions of the Clean Air Act

As indicated in the preceding section, costs do play an important role in determining how the NAAQS will be implimented. It is therefore not surprising that the challengers to EPA's interpretation can find concern in the Act's preamble, 42 U.S.C. § 7401(b)(1), for "the productive capacity of the population." See Appalachian Power Br. 29, 33, 35, 37, 45; see also *id.* at 29 (citing legislative history concerning the overall purpose of the 1977 amendments). But such generalities are irrelevant to the analysis of section 109(b).

The cross-petitioners and their supporters also rely on a number of cases that are inapposite to the interpretation of section 109(b). See Cross-Pet. Br. 45-47. For example, *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000), deals with programs designed to implement the NAAQS, not with the provisions governing the establishment of the NAAQS. The question in *Michigan* v. *EPA* was whether the emission reductions necessary to meet the NAAQS had to be made by upwind or downwind sources. The D.C. Circuit upheld EPA's approach of allocating the resulting pollution control burden in a manner that reduced the aggregate costs of compliance. See *id.* at 674-78. Other cases involve the interpretation of statutory provisions that *require* the consideration of costs. *George E. Warren Corp.* v. *EPA*, 159 F.3d 616 (1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999), involves the regulation of certain gasoline under section 211 – a provision in which costs play an integral role. See 42 U.S.C. § 7545(c)(2)(A)-(B), (k)(1). *NRDC* v. *EPA*, 937 F.2d 641 (D.C. Cir. 1991), concerns the setting of standards for major emitting facilities in areas that have attained compliance with the NAAQS. These standards are set by

reference to BACT, 42 U.S.C. § 7475(a)(4), which must take costs into account.[4]

D. The Challengers Fail in their Efforts to Introduce Economic Considerations into the Term "Public Health"

Having repeatedly failed in legislative attempts to require that economic concerns be taken into account in setting the NAAQS, see Part I.C, *supra*, the cross-petitioners and their supporters now claim that the term "public health" in section 109(b) always required the consideration of costs. Cross-Pet. Br. 33-36; Am Br. of General Electric 14-15; Am. Br. of Sen. Hatch *et al.* 6-7. In making this implausible assertion, they rely principally on a 1951 book, which they assert was the "authoritative public health definition available to the 1970 Congress," Cross-Pet Br. 34, and on a presentation at a Harvard faculty meeting. Am. Br. of Sen. Hatch *et al.* 7, n.8.

The meaning of "public health" must be determined in light of the statutory context in which it is used. Section 109(b) directs EPA to establish standards requisite to protect public health on the basis of air quality "criteria." The exclusive subject of these criteria is scientific information related to adverse health effects, not economic considerations. 42 U.S.C. § 7408(a)(2); Part III.A, *supra*. When Congress enacted the 1970 Clean Air Act, it prescribed that the NAAQS for the five pollutants for which criteria had already been prepared be proposed within 30 days of the Act's passage, *id.* § 7409(a)(1)(A), leaving no time for revising the criteria. In doing so, Congress was aware of the purely health-based content of

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[4] Cross-petitioners' reliance on *Vinyl Chloride*, 824 F.2d at 1146, is similarly misplaced, since that case did not cast any doubt on *Lead Industries'* interpretation of section 109(b). See *id.* at 1157-59; Part II.B, *supra*.

these five criteria. See Am. Br. of Clean Air Trust and Sen. Stafford 15-18.

Further, if the term "public health" encompassed economics, Congress would not have deemed it necessary in the Clean Air Act to repeatedly describe public health and economic concerns as distinct concepts. For example, the Clean Air Act authorizes EPA to issue regulations establishing emission standards for heavy-duty vehicles based on their pollution's effects "on the public health and welfare, and taking costs into account." 42 U.S.C. § 7521(a)(3)(B)(i); see *id.* § 7521(a)(3)(D) (controlling emissions resulting from rebuilding engines that may "endanger public health or welfare taking costs into account"). Likewise, the statutory provisions governing CASAC provide for advice regarding "adverse public health, welfare, social, economic, or energy effects" of pollution control strategies. *Id.* § 7409(d)(2)(C)(iv); see *id.* § 7412(f)(1)(B) (report on the "public health significance" of certain risks and the "costs of reducing such risks"); *id.* § 7612(b) (report on "the economic, public health, and environmental benefits" of compliance efforts). These statutory distinctions between public health and economic considerations would have been unnecessary had Congress believed that economics was subsumed within the meaning of "public health." See *Dunn* v. *CFTC*, 519 U.S. 465, 472 (1997) (legislative enactments should not be construed to render their provisions mere surplusage).

It appears that Congress employed the term "public health" in the Clean Air Act for the purpose of distinguishing the health of populations, which is the concern of "public health," from the health of individuals, which is the concern of clinical medicine. See Elizabeth Fee, *Disease and Discovery* 2 (1987) ("Public health is oriented toward the analysis of the determinants of health and disease on a population basis, while medicine is oriented

toward individual patients."). Indeed, the legislative history stresses that the purpose of the NAAQS is to protect particularly sensitive populations, not particularly sensitive individuals. S. Rep. No. 91-1196, at 10 (1970).

Even the 1951 book upon which the cross-petitioners rely so heavily does not support their argument. Cross-Pet. Br. 34-35. It states that "[p]ublic health is the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency." C.E.A. Winslow, *The Cost of Sickness and the Price of Health* 28 (1951). By "efficiency," Winslow means personal fulfillment, not economic efficiency, as evidenced by his discussion of the "aim of raising the general level of vigour, efficiency, and satisfaction by a more positive physiological approach." *Id.* at 31.

Winslow distinguishes between the meaning of public health and the means to achieve its ends: "The promotion of the health of the peoples of the world is basically a moral – not an economic – issue. The means of approaching that objective are, however, practical ones, which involve financial considerations." *Id.* at 72. The Clean Air Act employs a directly analogous approach: The setting of the NAAQS does not permit economic tradeoffs but the strategies for attaining the NAAQS require such tradeoffs. See Part III.B.2, *supra*.

For more than two decades, there have been elaborate congressional deliberations about whether to amend the Clean Air Act and require economic factors to be taken into account in setting the NAAQS. Part I.C, *supra*. The cross-petitioners and their supporters implausibly suggest that none of this discussion was really necessary because tradeoffs between health and economic concerns were required by the term "public health" in section 109(b). Their strained arguments lack merit.

CONCLUSION

For the foregoing reasons the judgment of the D.C. Circuit with respect to the consideration of costs under section 109(b) of the Clean Air Act should be affirmed.

Respectfully submitted,

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No. 99-1426

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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, CONNECTICUT, IOWA, MAINE, MARYLAND, NEW MEXICO, NEW YORK, WASHINGTON, AND VERMONT IN SUPPORT OF CROSS-RESPONDENTS

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INTEREST OF *AMICI* STATES

The interest of *amici* States in this case is real and immediate, as real as the decision as to which industries to control and how much in order to be able to meet a federal standard, and as immediate as the asthma attack that takes a child from the softball field to the hospital on a hot summer day. As the "hands-on" partners in the complex Federal-State partnership forged by the Clean Air Act ("the Act" or "the CAA"), it is the States that must devise the control strategies, develop and enforce the permits, and pass the legislation necessary to meet and maintain the National Ambient Air Quality Standards ("NAAQS"). It is also the States that must cope with the health effects on their citizens that result from air pollution, and that are most answerable to their citizens for either the success or the failure of air pollution control in this country.

Thirty years ago, the Act established the basic principle that there would be nationwide, health-based, federally-established air quality standards, and that States would develop and enforce the plans to meet them. Since that time, all fifty States have structured their air pollution control programs around those nationwide standards and the plans by which States meet them. The regulatory structures of every State are based, overall, on the Clean Air Act's requirement that States meet the health-based NAAQS. Some States do not even have their own independent air quality standards, but simply use the NAAQS as their benchmarks.[1] Many States, like *amicus*

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[1] *See, e.g.*, New Hampshire (N.H. Code Admin. R. Env-A 301.03(c) (defining ambient air quality standards as the level "designated by the Administrator of the EPA which is judged as necessary to protect the public health"); Vermont (Reg. 5-301 (stating that "[t]he ambient air quality standards contained in this subchapter are based on national ambient air quality standards, where such national standards exist"). *See also* Pennsylvania (Pa. Stat. § 4044.2 (1999)) (requiring that State

California, set their own, more stringent, independent standards.[2] Many States set their standards, whether at NAAQS level or more stringently, pursuant to State statutory mandates to protect the "public health" such as the one that the Court is asked here to interpret.[3] To decide at this late date that the NAAQS have from the outset been set by the wrong standard – the ineluctable result of reversing the Court of Appeals' decision here – would throw into doubt and chaos the settled expectations and the air pollution control apparatus of the entire nation.

A point that is often overlooked but that is critical for understanding the Act is that no NAAQS is directly enforceable. *Coalition Against Columbus Center v. City of New York*, 967 F.2d 764, 769-71 (2d Cir. 1992). A NAAQS becomes enforceable only when a State turns that NAAQS into a control strategy, regulations, and actual, enforceable permits and restrictions. It is virtually impossible to overstate the detail and extent of the laws, regulations, permits, and decisions that have been based upon the NAAQS, and that are embodied in the State Implementation Plans ("SIPs") to meet and maintain the NAAQS that the States prepare and submit to the United States Environmental Protection Agency ("EPA").[4]

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standards be "no more stringent" than federal standards, with the result that the State standards necessarily are identical to the federal standards).

[2] *See, e.g.*, California (Cal. Health and Saf. Code § 39606); Colorado (Colo. Rev. Stat. § 25-7-108) (setting non-federal standard for visibility); North Carolina (N.C. Gen. Stat. § 143-215.107(b)).

[3] *See, e.g.*, Massachusetts (Mass. Gen. Law. ch. 310, § 6.02(1)); New Jersey (N.J. Admin. Code tit. 7, § 7:27-13.1); Wisconsin (Wis. Stat. § 285.01(9)).

[4] While California is not a typical State, in physical size, in population, or in the tenacity of its air pollution problems, the size of California's SIP gives an idea of the magnitude of the regulatory edifice that rests on the NAAQS. The last complete

A SIP begins with establishing the many separate air quality control regions or planning areas with a State; planning by separate areas is necessary because the meteorology, topography and type of pollutant sources vary by region. Using California as an example of a large State, it has fifteen different air quality planning areas and thirty-five air districts for which air quality planning is done. Colorado, as an example of a smaller State, has thirteen air quality control regions, but does separate planning for its five nonattainment areas for carbon monoxide, seven nonattainment areas for particulate matter, and one nonattainment area for ozone. Each area has a separate control strategy for each pollutant, since different regions will have varying problems with, and goals for, different pollutants (e.g., urban areas will probably have to focus on ozone reduction or particulate emissions from trucks and cars, while rural areas may be more concerned with preserving visibility). Each control strategy within each region must be embodied in rules and regulations directed at each of the six pollutants covered by a NAAQS, and some pollutants require statewide regulations as well (e.g., automotive emissions standards for California and the Northwest States). Finally, permits must be issued for individual sources that govern their day-to-day operation. The NAAQS and the SIPs designed to meet them, permeate every county, city, borough, and town in every State, and have been forged only through extensive and often painful technical and policy choices.

Should the Court reverse the decision below, every SIP and all its component parts may be cast into doubt. The SIPs are focused on attainment and maintenance of the NAAQS; if the Court decides that EPA has always

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SIP filed by California with EPA, not counting amendments that are filed as needed, was filed in 1994; that SIP filled *twenty-six banker's boxes*. Not included in those twenty-six boxes were regulations aimed solely at enforcing those air quality standards set by California that are more stringent than required to meet the NAAQS.

misunderstood how the NAAQS are to be set, every SIP could be open to challenge. It is not fanciful to expect that industry petitions will flood EPA, and thence the courts, seeking to overturn each and every NAAQS, as well as every regulation, rule, and permit based on those NAAQS. What is now a solid and comprehensive regulatory structure could suddenly become a house of cards, ready to topple, with every rule and every permit potentially in doubt.

Further, State air quality standards might similarly be cast into doubt. As set out, *supra*, many States rely principally on the NAAQS to define air quality and do not set independent air quality standards, or rely on statutory language identical to that found in the relevant section of the Act to set their standards. Those States would suddenly find themselves without an authoritative basis for their air pollution programs. Some States set their own air quality standards, but base them on health protection, following what has always been perceived as the model of the Clean Air Act.[5] These States can anticipate that their independent state standards will be next in line for an industry challenge, should the Court accept industry's invitation to establish a court-made rule that air quality standards cannot rationally be set without consideration of compliance costs. The States would face the front-line problems of protecting the health of their citizens from the very real dangers of air pollution while the Congress and EPA scrambled to respond to such a rule, whether with new legislation, new NAAQS, or both. The setting of a NAAQS is a lengthy process now; it would be more so if the basis for each of the NAAQS had to be reevaluated, and that new basis inevitably litigated. Reevaluation of

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[5] *See, e.g., Western Oil & Gas Ass'n v. Air Resources Board*, 37 Cal.3d 502, 516-19 (1984) (holding that California's Air Resources Board is not to consider costs in setting ambient air quality standards, and citing, *inter alia*, the federal Clean Air Act and federal case law similarly construing the NAAQS, as authority for its conclusion).

the basis for setting the NAAQS could cause this country to drift for many years with literally no national plan for ensuring air quality, before new NAAQS could be set, new rules for meeting them developed, new SIPs drafted, and permits crafted all over again.

Meanwhile, States would have the continuing responsibility for ensuring that their residents breathe healthy, safe air. The health of their residents and the integrity of their air pollution regulatory schemes comprise the interest of *amici* States.

SUMMARY OF ARGUMENT

Industry Cross-Petitioners and their *amici*, particularly *amicus* General Electric, have issued to the Court a stunningly frank and open invitation to legislate. They plainly and forthrightly ask the Court to rewrite thirty years of unanimous interpretation of the Clean Air Act by courts, by the agency charged with administering it, and – most important – by Congress. Cross-Petitioners and their *amici* seek to replace the health-protective philosophy upon which the NAAQS have always been based, as interpreted in *Lead Industries v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied sub nom., Lead Industries v. EPA*, 449 U.S. 1042 (1980), with the current cost-based, monetized philosophy they think Congress should have employed to attack the problem of air pollution.

Petitioners' argument rests solely on a tortured, out-of-context reading of one or two phrases in the Act, together with a plethora of articles and arguments by certain contemporary economists and theoreticians who seek to rewrite the Act to conform to their own cost-benefit preferences for public policy. By contrast, the relevant portion of the decision below rests on straightforward language in the Act, copious legislative history, internal structural evidence in the Act, and decades of consistent and unbroken interpretation by both the agency responsible for administering the Act and the courts charged with interpreting it. The text and structure

of the Clean Air Act demonstrate that, where Congress intended costs to be taken into account, it said so explicitly, and gave precise and detailed instructions as to how to do so. The total absence of any such provision or directions demonstrates that Congress did not intend costs to be considered in the setting of the national standards. Further, Congress intended the Act to force technology, making it difficult to rationally predict costs.

Amici States believe that this is an apt case for the application of a *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), step one, analysis: Congress has spoken to this question directly, and where Congress has so spoken, the courts are bound to carry out Congress' expressed intent. To hold for industry here would be to go back not just thirty years to before Congress passed the Act, but to return to pre-*Chevron* days; industry here asks the Court to impose its own conception of public policy upon statutes, regardless of the intent of the democratically elected Congress.

ARGUMENT

I.

COMPARISON OF SECTION 109(b) WITH OTHER SECTIONS OF THE ACT SHOWS THAT, WHERE CONGRESS INTENDED COSTS OF COMPLIANCE TO BE TAKEN INTO ACCOUNT, IT SAID SO AND PROVIDED DIRECTIONS ON HOW TO DO SO. THE ABSENCE OF SUCH DIRECTIONS IN SECTION 109(b) MEANS THAT CONGRESS DID NOT INTEND COSTS TO BE TAKEN INTO ACCOUNT

In *Union Electric Co. v. Environmental Protection Agency, et al.*, 427 U.S. 246, 256, n. 5 (1976), the Court held that a comparison between different sections of the Act could illuminate the intent of Congress as to consideration of costs or feasibility. Such a comparison is very enlightening here. Comparison between Section 109(b)(1) and other sections of the Act shows that, where Congress

did intend costs to be taken into account, it not only said so explicitly, but gave specific, fairly comprehensive instructions to the Administrator as to how to do so. The absence of any instructions, let alone any that resemble the detailed ones found in other provisions of the Act, shows convincingly that Congress did not intend compliance costs to be among the factors the Administrator considers when setting the NAAQS.

Two examples suffice. When it ordered EPA to set standards of air pollution control performance for new major stationary sources of emissions (the New Source Performance Standards, or NSPS), Congress required EPA to set standards:

> "which reflect[ ] the degree of emission limitation achievable through the application of the best system of emission reduction which (*taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirement)* the Administrator determines has been *adequately demonstrated.*"

CAA Section 111(a)(1), 42 U.S.C. § 7411(a)(1) (emphasis added). Thus, the Administrator must determine that a technology has been demonstrated, and is not simply theoretical, before requiring it, and must consider the monetary costs of compliance, must consider collateral health and environmental harms and benefits, and must consider any effects on energy. Section 111 also contains directions from Congress to the Administrator on how to set priorities for establishing new NSPS standards, when work rules could be used instead of a standard of emissions control, and how and when to waive the NSPS in order to allow new technology to be demonstrated. The factors to be considered by the agency under Section 111, and the instructions as to how that agency should consider these factors when making rules, are comprehensive, wide-ranging, and thorough.

Similarly, when Congress overhauled the Act in the 1990 Amendments, it set up a new approach to control of hazardous air pollutants, and was extremely careful to

provide the Administrator with precise directions as to when and how she should consider costs. Section 112(d)(2), for example, provides in pertinent part:

> "Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources. . . . "

CAA § 112(d)(2), 42 U.S.C. § 7412(d)(2). Section 112(d)(3) gives additional, extremely explicit directions as to what reduction technology may be considered achievable, including percentages of sources and timetables. Congress specified that:

> "The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. . . . "

CAA § 112(d)(3), 42 U.S.C. § 7412(d)(3). Section 112(d)(3) goes on to provide in almost minute detail what standards the Administrator must set, what percentage of sources must have achieved a given level of emissions reduction by a given time before that degree of control will be considered achievable, and how many sources must have achieved a given level of emissions reduction before the Administrator may set such level as a standard under Section 112, all factors that clearly go to cost and feasibility of compliance. *See also* Part D, Subpart 2, 42 U.S.C. §§ 7511, *et seq.*, where Congress itself did the balancing and comprehensively listed control measures that States must adopt for nonattainment areas, according

to the degree of severity of the nonattainment problem in each category of area.

Moreover, in Section 112(f)(2), Congress directly spoke to the issue of balancing health risks from hazardous air pollutants and costs of compliance, ordering the Administrator to set further hazardous pollutant emissions standards under specified circumstances. Section 112(f)(2) requires EPA to adopt these emissions standards:

> "if promulgation of such standards is required in order to provide an ample margin of safety to protect public health and welfare in accordance with this section (as in effect before November 15, 1990), or to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect. . . . "

CAA § 112(f)(2), 42 U.S.C. § 7412(f)(2) (emphasis added).

These remarkably detailed Sections show that, where Congress intended for costs to be considered, it expressed that intent so as to leave no doubt.[6] This is not the case in Section 109(b)(1). While *Cross-Petitioners* spin elaborate

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[6] *Cf. Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, 824 F.2d 108, 114-115 (D.C. Cir. 1987) ("[W]hen Congress desired agencies to consider economic costs, it knew how to say so, *see American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 510, 101 S.Ct. 2478, 2491, 69 L.Ed.2d 185 (1980); presumably, when Congress desired to permit agencies to consider economic costs, it knew how to say so as well, *see Union Electric*, 427 U.S. at 257 n. 5, 96 S.Ct. at 2525 n. 5.").

theories about how costs of compliance could be considered in setting the NAAQS, Brief of Cross-Petitioners American Trucking Associations, *et al.* ("Cross-Pet. Brf.") at 32-33, examination of the statute shows that *Congress* did not provide any such direction whatever. Given the central position in the clean air scheme of the Act that the NAAQS enjoy, affecting every place and every person in the country, it makes no sense that Congress would have so glaringly omitted directions on how to take costs into account there, while simultaneously providing such meticulous directions in far less central portions of the Act that do not necessarily affect all places and all people. The omission can mean only that Congress did not intend for compliance costs to be taken into account when setting the NAAQS.

A parsing of the text of Section 109 confirms this reading. Section 109(b) provides for the issuance of primary NAAQS only for pollutants for which air quality criteria have been issued. Section 108 provides that these air quality criteria "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutants in the ambient air, in varying quantities." CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). Section 109(b) requires that NAAQS must be "based on such criteria" together with what the Administrator deems an "adequate margin of safety . . . requisite to protect the public health." CAA § 109(b), 42 U.S.C. § 7409(b). But while the criteria contain detailed, carefully and comprehensively vetted and reviewed scientific and health data and studies, Congress did not order them to contain – and they do not contain – any information about costs. No consideration of costs could possibly be based on the criteria, since data on such costs are simply not there.

Congress was not chary with its instructions as to taking costs into account *when that was what Congress intended*. The utter lack of such guidance in Section 109(b) shows that Congress did *not* intend it as to the setting of

the NAAQS. As the Court recently noted, "Congress could not have intended to delegate a decision of such economic and political significance . . . in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, ___ U.S. ___, 120 S.Ct. 1291, 1315 (2000).

II.

THE TEXT, THE LEGISLATIVE HISTORY, AND THE STRUCTURE OF THE CLEAN AIR ACT ALL DEMONSTRATE CONCLUSIVELY THAT CONGRESS DID NOT INTEND COSTS OF COMPLIANCE TO BE TAKEN INTO ACCOUNT IN SETTING THE NAAQS

Industry argues that the text, structure, and legislative history of the Act all support the view that costs of compliance should be taken into account in setting the NAAQS. On the contrary, each of these factors shows that Congress understood and intended that the NAAQS would be set solely on the basis of protection of health, not costs of compliance.

A. In Enacting the 1970 Clean Air Act, Congress Understood Air Quality Standards That Protect "Public Health" as Being Standards Set Below the Levels at Which Demonstrated Health Effects Occur

Congress' directions as to how the primary NAAQS were to be set are short. Section 109(b)(1) provides:

> "National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated."

CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). Since the Act was passed, the EPA Administrator has interpreted this Section to require that the primary NAAQS be set solely on the basis of health effects information.[7] Courts have also interpreted the Section in the same way.[8] Most importantly, Congress has explicitly and impliedly reaffirmed that it intended the NAAQS to be set on the basis of health.

Cross-Petitioners and their industry *amici* seek to reverse this long-standing, consistent, virtually unanimous interpretation of Section 109. Instead, they attempt to find evidence that has somehow eluded the courts and the Administrator for thirty years that Congress intended the primary NAAQS to be set taking cost of compliance, and societal costs, into account. Cross-Petitioners first cite the requirement in Section 109(b)(1) that the primary NAAQS must be set based on the air quality criteria documents prepared pursuant to Section 108(a), and established at levels "allowing an adequate margin of safety, [that] are requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1).

As Cross-Petitioners correctly point out, the Act itself does not define the term "public health." (Cross-Pet. Brf. at 33-34.) Because there is no statutory definition of the

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[7] *See, e.g.*, 49 Fed. Reg. 6866, 6866-67 and *passim* (Feb. 23, 1984); 52 Fed. Reg. 24634, 24635 and *passim* (July 1, 1987); 53 Fed. Reg. 52698, 52701 and *passim* (Dec. 29, 1988); 58 Fed. Reg. 13008, 13008 and *passim* (March 9, 1993); 62 Fed. Reg. 38856, 38878 and *passim* (July 18, 1997).

[8] *Natural Resources Defense Council v. EPA*, 902 F.2d 962 (D.C. Cir. 1990), *cert. denied sub nom., American Iron & Steel Institute v. EPA*, 498 U.S. 1082 (1991); *American Petroleum Institute v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981), *cert. denied sub nom., American Petroleum Institute v. Gorsuch*, 455 U.S. 1034 (1984); *Lead Industries v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied sub nom., Lead Industries v. EPA*, 449 U.S. 1042 (1980) and *St. Joe's Minerals Corp. v. EPA*, 449 U.S. 1042 (1980); *see also NRDC v. EPA*, 894 F.2d 1146 (D.C. Cir. 1987) (*en banc*).

term, Cross-Petitioners concoct one to suit their liking, a definition that includes the overall effects of regulation on the standard of living of the population in general. They cite as support what they characterize as "[t]he authoritative public health definition" in C.E.A. Winslow's *The Cost of Sickness and the Price of Health*, which they contend defines "public health" as including the effect that regulatory controls may have on the population's "standards of living." *Id.* Cross-Petitioners argue that Winslow, as well as subsequent "scholarly literature" articles, establish that "public health" was a term of art encompassing economic factors at the time the 1970 Act was enacted, and that Congress must have used it with the Winslow definition in mind.

The premise of this argument is pure fiction: Winslow was writing primarily about the horrific effects of communicable diseases such as tuberculosis on the "standards of living" of populations, and in that context, it is clear that he championed health and welfare policies that would improve standards of living by eradicating disease and allowing people to remain healthy. Nothing in the quotation provided by Cross-Petitioners supports their implication that Winslow feared that promotion of health and eradication of disease would lower standards of living if left unchecked by consideration of the costs of such efforts. Moreover, Cross-Petitioners do not even try to show that anyone in the public health field interpreted Winslow's work in that way at any time in the two decades that elapsed between its publication and the adoption of the 1970 CAA by Congress, or indeed that such an opinion was ever held or voiced by any public health scholars or policymakers during that period.[9]

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[9] *See also* Brief of *Amicus Curiae* Environmental Defense and American Public Health Association, on Behalf of Cross-Respondents, at 27-29 (demonstrating that Cross-Petitioners' definition has been taken out of context and that, taken in its entirety, it does not support Cross-Petitioners' argument).

More fundamentally, Cross-Petitioners' argument, even if it might be relevant to establishing what the public health community meant by "public health" in 1970, would still prove nothing whatever about what Congress meant by that term. Cross-Petitioners advance not a single scrap, not a scintilla, of evidence that Congress ever read the Winslow work, or that the committees preparing the Clean Air Act in any way accepted any definition of "public health" that contemplated consideration of compliance costs, or even knew about such a definition. Cross-Petitioners say nothing as to whether Congress intended the term to have the meaning in the Act that Cross-Petitioners argue it had in the public health field. Indeed, the fact that Congress chose in 1968 to take the regulatory apparatus for controlling air pollution *out* of the Public Health Service, where it originally had been, and move it to a new National Air Pollution Control Administration ("NAPCA") in the Consumer Protection and Environmental Health Service of the Department of Health, Education and Welfare[10] is evidence that, if anything, Congress thought that air pollution control should *not* be contained within the traditional public health regulatory framework, but be part of environmental protection. The eventual Congressional ratification of President Nixon's decision to fold NAPCA into the new Environmental Protection Agency lends weight to such a conclusion.

As to the literature to which Cross-Petitioners refer the Court, the articles they cite at pages 35-36, particularly in the lengthy note 1, were written twenty to thirty years *after* the 1970 Clean Air Act was enacted. Cross-Pet. Brf at 35-36, n. 1, 36 in text. They do *not* constitute evidence of what the 1970 Congress actually read, knew, considered, or meant.

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[10] CHARLES O. JONES, CLEAN AIR: THE POLICIES AND POLITICS OF POLLUTION CONTROL 111 (1975).

On the other hand, there is considerable evidence as to what that 1970 Congress actually did know and consider. In *Union Electric Co.*, 247 U.S. 246, at 258-259, the Court determined the intent of Congress as to whether the Administrator may consider the costs of the strategy chosen by a State in its SIP, by quoting the manager of the Senate bill, Senator Muskie, who explained the bill's intent as follows:

> " ' "The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect *the health of persons*. This may mean that people and industries will be asked to do what seems to be impossible at the present time." ' 116 Cong. Rec. 32901-32902 (1970)." (Emphasis added.)

Id. Union Electric went on to quote the Senate Committee Report:

> " 'In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) *the health of people* is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to *public health*.' "

S. Rep. No. 91-1196, 2-3 (1970) (emphasis added), quoted at 247 U.S. 259. These quotes show not only that Congress very explicitly intended for protection of health to trump technological feasibility and cost, they also show that Congress, and the Senate manager of the bill, used the terms "health of persons," "health of people," and "public health" interchangeably, rather than using "public

health" as the narrow term of art for which Cross-Petitioners and their *amici* argue.

In 1990, Congress enacted a change to the Act that constitutes an implicit ratification of the *Lead Industries* interpretation of Section 109(b). The 1990 Amendments enacted Section 107(d)(5), which authorized the Administrator to order the States to designate air quality regions as being in or out of attainment with "the national ambient air quality standard for lead in effect as of November 15, 1990. . . . " That standard is, of course, the one upheld in *Lead Industries*. The designation process, when a region is designated as nonattainment for a standard, begins the entire SIP process as to that region and that pollutant. Congress would hardly have authorized EPA to start this process, which requires the development of control strategies, regulations, and so forth, with regard to the lead standard if it considered that the lead standard had been wrongly set. Congress made very extensive revisions to the Act in 1990, specifying in considerable detail what it did and did not want SIPs to contain. It is inconceivable that Congress enacted this provision, referring to a particular standard ("the national ambient air quality standard for lead in effect as of November 15, 1990"), rather than a more general reference to the NAAQS, without knowing what that lead standard was, and without knowing the D.C. Circuit decision that had affirmed that standard. This is direct evidence that Congress spoke to the particular question at issue here, namely, the validity of the *Lead Industries* decision and the standard it affirmed, and demonstrated its approval.

Besides this statutory provision, the legislative history of the 1990 Amendments also endorses the view embodied in *Lead Industries*. While it is the purview of the courts, and not a later legislature, to interpret a statute, the views of a later Congress as to the meaning of a statutory provision can be considered at least as evidence

of what that later Congress intended.[11] Here, the 101st Congress, second session, in enacting the 1990 amendments to the Act without changing Section 109(b)(1), did not simply leave Section 109 in place and remain silent

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[11] *See, e.g., Staples v. United States*, 511 U.S. 600, 636 (1994) ("[w]hen Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language" (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994) (citing *Lorillard*); *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (citing *Lorillard*); *Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (citing *Lorillard*); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) ("Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction . . . " (citing *Bob Jones University v. United States*, 461 U.S. 574, 601-602 (1983)); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782, n.15 (1984) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change [citations omitted]. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"); *Id.*, 470 U.S. 768 at 803 (White, dissenting) ("I do not suggest that Congress' inaction in the face of an authoritative statutory interpretation brought to its attention is never probative of the proper interpretation of the statute"); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 846 (1985) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " [Citations omitted.]); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 427 (1985) (same).

about it, Congress affirmatively expressed its interpretation of the correct basis for the primary NAAQS:

> "As defined in the Act, "primary" ambient air quality standards limit the maximum allowable concentration of each criteria pollutant to the level that 'protects the public health' with an 'adequate margin of safety', *without regard to the economic or technical feasibility of attainment*. This means identifying through research *the lowest level at which health effects are observed* and applying a margin of safety to arrive at the ambient standard."

S. Rep. No. 101-228, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3391 (emphasis added). The 101st Congress stated that it viewed a standard that protects public health, as the term was used in the Act, as meaning a standard based on health effects with an additional margin of safety to make the standard even more protective. There is no hint of the definition of "public health" as a term of art encompassing overall economic welfare, and certainly no intent expressed by the 101st Congress that costs of meeting a primary standard were to be a part of the basis for setting that standard; the legislative history is unequivocally to the contrary.

Cross-Petitioners have advanced only speculation and surmise as to the meaning of the phrase "public health" as their textual support for their position. The overwhelming weight of both text and legislative history is to the contrary, and supports Cross-Respondent here.

B. Requiring the Administrator to Provide Nuts-and-Bolts Control Technology Information to the States, and the Role of CASAC in Evaluating the Relative Effects of Different Control Strategies, In No Way Mandates That the Administrator Consider Costs in Setting the NAAQS. On the Contrary, They Are Part of the Federal-State Partnership Set Up by the Act.

Industry makes two other purportedly "textual" arguments, contending that two other provisions of the Act require consideration of costs: First, that Section 108(b), which requires that the Administrator give control technology information to the States; and second, that Section 109(d)(2)(B), which requires that the Clean Air Scientific Advisory Committee ("CASAC") advise the Administrator as to strategic considerations for *achieving* the NAAQS, somehow also requires the Administrator to consider costs in *setting* the NAAQS. Both arguments are wrong.

Section 108(b) calls solely for the Administrator to "issue *to the States and appropriate air pollution control agencies* information on air pollution control techniques," including data on cost of installation and energy and environmental effects of a proposed NAAQS at the same time that the Administrator proposes it. CAA § 108(b), 42 U.S.C. § 7408(b) (emphasis added). Section 109(d)(2)(C) requires that the Administrator appoint the CASAC to advise her regarding new NAAQS, and especially about the "adverse public health, welfare, social, economic or energy effects which may result from various strategies for attainment of such national ambient air quality standards." CAA § 109(d)(2)(C), 42 U.S.C. § 7409(d)(2)(C). Neither of these provisions mandates that the Administrator consider costs in setting the NAAQS; rather, both should be read in the context of the federal-State partnership created by the Act.

Each of these provisions lies outside of Section 109(b)(1), which is the only Section that explicitly sets

out the basis upon which the NAAQS are to be set. As the Court held in *Union Electric*, 246 U.S. 246 at 257, where Congress sets out a definitive list of factors upon which the Administrator is to make a decision under the Act, the Administrator is limited to that list. ("The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified. . . . ") *Id.* Here, Congress did specify the factors the Administrator is to consider, and the information required under Sections 108(b) and 109(d)(2) is not among them. Further, it is not reasonable to read "criteria" as referring to anything other than the Section 108(a) criteria documents. Subsection (a) speaks, in 109(a)(1)(A), of national ambient air quality standards "for which air quality criteria have been issued" before December 1, 1970, and 109(a)(2) refers to national standards being adopted "with respect to any air pollutant for which air quality criteria are issued after December 31, 1970." CAA § 109(a)(1)(A), 42 U.S.C. § 7409(a)(1)(A). Section 109(a)'s references to ambient air quality standards for which air quality criteria have been *issued* cannot be read as anything other than a plain reference to the air quality criteria documents that are issued under Section 108, without doing violence to the meaning of both Sections. Moreover, Section 109(b)(1) directs the Administrator to base the national primary and secondary air quality standards, "prescribed under subsection (a) of this section," on "such criteria." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). This Section can be read only as referring to the Section 108(a) air quality criteria, the only "criteria" relevant to section 109 and the only criteria that are "issued" under the Act. "Criteria" in this context is a term of art under the Act, and is used as such in Sections 109(a)(1) and 109(b). *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 967, 973 (D.C. Cir. 1990), *cert. denied sub nom., American Iron & Steel Institute v. EPA*, 498 U.S. 1082 (1991).

Since Congress has itself listed the factors upon which the NAAQS are to be based, and these factors do

not include Sections 108(b) or 109(d), Congress did not intend the Administrator to consider those factors.

Beyond these textual arguments, Section 108(b) and Section 109(d) can only be correctly understood in the context of the federal-State partnership that permeates the Act. Having made the decision to assign to the States the difficult decisions about what control strategies to adopt, and how to carry them out, Congress concomitantly decided to give the States all the help it could. Congress authorized monetary grants to the States to assist them, CAA § 175, 42 U.S.C. § 7505, and was extremely liberal in mandating the supplying of information and technical assistance to the States. The Act is filled with requirements that EPA provide technical information and assistance to the States in their formidable task of actually crafting the plans that will clean the air. *See, e.g.*, CAA §§ 178, 182(a)(2)(A), 182(a)(3)(B), 182(b)(2), 183(a), 190, 42 U.S.C. §§ 7508, 7511a(a)(2)(A), 7511a(a)(3)(B), 7511a(b)(2), 7511b(a), 7513b.

Plainly, Congress perceived the enormity of the task it was assigning to the States, and gave them every tool and bit of information it could to assist them in that task. The 1970 Act allowed only 30 to 90 days for the Administrator to adopt the first NAAQS, and gave the States only three short years beyond that time (or a shorter period, at the Administrator's discretion), to develop, adopt, and submit the first SIPs, an astonishingly short time for such a massive undertaking. CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1). The Court early on recognized that "Congress imposed upon the States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time" when it passed the 1970 Act. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 68 (1975). It is in this light that Sections 108(b) and 109(d)(2)(C) must be seen. Section 108(b) requires the Administrator, when issuing the criteria documents upon which NAAQS will be based, simultaneously to give to

the States information about air pollution control technology, energy requirements, cost, and other technical information. CAA § 108(b), 42 U.S.C. § 7408(b). The provision of this nuts-and-bolts information was intended by Congress to assist the States in starting to devise their control strategies and their SIPs. Cross-Petitioners cavalierly assert that reading Section 108(b) as mandating provision of information to the States for any purpose other than commenting on a proposed NAAQS (e.g., to provide it to them to assist in SIP planning) would be "inexplicably premature." Cross-Pet. Brf. at 40. *Amici* States can only observe that Cross-Petitioners have never tried to draft a SIP if they think this is a short time. The Section 108(b) advice is not premature: it now precedes the highly complex SIP by four to five years, and it was absolutely imperative in 1970 when the Section was enacted and States had only three years.

Similarly, the advice that Section 109(d)(2)(C) mandates CASAC to give to the Administrator as to the relative effects of "various *strategies*," CAA § 109(d)(2)(C), 42 U.S.C. § 7409(d)(2)(C) (emphasis added), to attain a specific NAAQS, can only be correctly understood as part of this federal-State partnership. The information is given to the Administrator so that she may serve as a central clearinghouse, passing that information in turn to the States, and to make the Administrator aware of what additional technical guidance and assistance the States might need as they chose the strategies that only they are authorized to choose to meet the NAAQS.

Cross-Petitioners argue that because CASAC must advise the Administrator about social and economic effects of strategies to meet the NAAQS, the Administrator must add such effects to the list of factors set out in Section 109(b)(1) as the basis for the NAAQS. To accept this argument, the Court must conclude that Congress intended to add to the apparently exclusive list of factors

in Section 109(b)(1) without so stating, either in the text or the legislative history.[12]

The Court would also have to conclude that Congress chose an extraordinarily inept method to obtain the intended result. Section 109(d)(2)(A) specifies that CASAC is a *scientific* review committee, not a cost-benefit review committee or an economics review committee. The legislative history supports that limitation, as the House report states:

> "Since the main function of the scientific review committee is to assess the *health and environmental effects of ambient air pollution*, it is anticipated that all seven members would be selected on the basis of their special expertise in the fields of environmental toxicology, epidemiology and/or clinical medicine, or in the fields of environmental or ecological systems."

H.R. REP. NO. 294, 95th Cong., 1st Sess. 179-84 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1258-62 (emphasis added). Section 109(d)(2) particularly specifies that CASAC should include at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies. Had Congress actually intended CASAC to provide information and advice to the Administrator on the costs of removing air pollution from the air, it would presumably have directed that specialists in costs and economic effects at least be represented on the committee. It did not. On the contrary, as Congress "anticipated that all seven members would be selected on the basis of their special expertise in the

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[12] Rather, the language quoted from the House Report explicitly says that CASAC is to assess the health and environmental effects of air pollution "in the ambient air." This echoes the language of Section 108(a)(2) requiring the criteria documents to indicate the health or welfare effects that may be expected "from the presence of such pollutants in the ambient air." It is the effects of pollution, not pollution control, that CASAC is primarily to address.

fields of environmental toxicology, epidemiology and/or clinical medicine, or in the fields of environmental or ecological systems," it can fairly be said that Congress intended that *none* of the seven members be an economics specialist. While one member of CASAC should be a State air pollution control official, the mere presence on CASAC of a State air pollution control official would be a singularly obtuse method for Congress to express an intent to require the Administrator to take costs into account in setting the NAAQS.

Viewed within the federal-State partnership, CASAC's role in providing information and advice on various strategies to meet the NAAQS becomes obvious: it is to gather information on possible control strategies, evaluate it, and pass it on to the States, via the Administrator (it would make little sense for CASAC to try to furnish it directly to the fifty States severally, rather than using EPA's established lines of communication to the States). The key is Section 109(d)(2)(C)'s emphasis on *strategies* to meet proposed NAAQS. Within the split of responsibilities set up by the Act, the Administrator cannot, herself, choose those strategies. Information on the comparative effects of different strategies could not guide her in setting a NAAQS, since she could not know which strategy any given State might actually choose among the various strategies about which CASAC had given advice. The entities to which such information is most useful are the States themselves. Just as the Administrator is required to give States a wide variety of information and assistance under various parts of the Act. so in Section 109(d)(2)(C) Congress made one more provision for supplying information that could assist the States in their assigned role in the federal-State partnership. It in no way indicates any intention by Congress that the NAAQS themselves be based on costs.

III.

BASING THE NAAQS ON COST ESTIMATES MADE AT THE TIME OF STANDARD SETTING WOULD COMPROMISE THE HEALTH-PROTECTIVE INTENT OF CONGRESS, SINCE TECHNOLOGICAL AND REGULATORY CLIMATE CHANGES PRODUCE COST REDUCTIONS THAT ARE NOT FORESEEABLE WHEN NAAQS ARE SET

Besides the textual and legislative history considerations set forth above, there is another, very practical, reason why the NAAQS should not be set taking costs of compliance into account: the Administrator cannot predict with any accuracy in advance what the costs of compliance will be. Attempts to do so could well overstate costs and tend to support standards that are not stringent enough to accomplish Congress' intent to protect the public health.

The first reason that the Administrator cannot predict costs in advance is that, as stated *supra*, the NAAQS are not self-executing. There is no plan to meet them, there are no costs to compute, no one can know what technology will really be required of what industries, until the States devise and draft their SIPs and the SIPs go through the Act's approval process. At the time a NAAQS is set, the Administrator could only guess at how fifty different States would choose to meet that NAAQS, and then make estimates based on guesses, projected into an uncertain future, of what those inchoate and unpredictable SIPs might cost to carry out.

The second reason is that, even where it initially appears that the technology and its costs are known in advance, they very often are not and cannot be gauged with any reliability.[13] The history of the Clean Air Act,

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[13] *See* David Driesen, *Should Congress Direct the EPA to Allow Serious Harms to Public Health to Continue?: Cost-Benefit Tests and the Clean Air Act*, 11 Tul. Envtl. L. J. 217, 227-231 (1998).

and other environmental statutes, has proven that costs of compliance are inherently unknown and unknowable in advance, because technology changes.

It is virtually certain that the adverse health effects of air pollution will not change. The human lungs, heart, and other organs will continue to react to air pollution as they have done in the past, in the ways demonstrated in the health studies that have made up the criteria documents. If anything, our advancing scientific understanding of these health effects may show more effects, and more subtle effects, from air pollution in the future than those of which we now know. On the other hand, it is virtually certain that the technology available to meet the NAAQS *will* change, will become more effective and cheaper over time. Such was the clear intent of Congress, and such has been the history of the Clean Air Act over thirty years.

The Court has recognized "the technology-forcing character of the [1970] Amendments." *Train v. Natural Resources Defense Council*, 421 U.S. at 91. That Congress intended the Act to force technology appears in the legislative history. For example, the 1970 Conference Report says of automotive emissions standards:

> "The House bill did not amend the provisions of existing law relating to the establishment of standards for new motor vehicles. The Senate amendment deleted the requirements that such standards be based on a test of technical and economic feasibility, and provided statutory standards for passenger cars and required that such standards be achieved by a date certain. . . . The conference substitute follows substantially the Senate amendments. . . . The effective date of the standards is to depend on the period necessary to develop the requisite technology giving appropriate consideration to the cost of complying by that date."

CONF. REP. NO. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5374, 5381. The emissions

standards themselves for passenger cars were to be set to achieve a level of emissions reduction specified in the statute itself, and need not be based on technical feasibility or cost; cost was to be taken in account only in determining the final deadline. *Id.* The statutory standards set by the 1970 Act were formidable: a 90% reduction in some pollutants from the 1970 emission levels by 1975.

However, the commitment of the Congress in the Act to force technology went beyond the automotive industry. As Senator Muskie stated in introducing the bill that would become the 1970 Clean Air Act:

> "The first responsibility of Congress is not the making of technological or economic judgments or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met. I am convinced they can be met."

Remarks of Senator Muskie, quoted by Senator Kerry in 136 CONG. REC. S2826-01, S2835 (1990). The Conference Report for the 1977 amendments reiterated the theme:

> First, and foremost, protection of the public health remains the paramount purpose and value under the Act. Consideration of costs, energy, and technology is expressly authorized or required in many sections of the bill, but the overriding commitment of the 1977 Act (just as the 1970 legislation) is to the protection of public health. Second, this year's legislation *retains and even strengthens the technology forcing and technology encouraging goals of the 1970 Act.*

123 CONG. REC. H8662, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 1570 (emphasis added).

The 1970 automobile emissions standards are perhaps the most convincing example of the success of this technology-forcing strategy. While auto manufacturers denounced the 1970 Act's requirement of a 90% reduction in emissions by 1975,[14] predicting compliance costs of a magnitude that would "do irreparable damage to the U.S. economy," the emissions reduction mandate of the Act forced the development of the catalytic converter, and standards that had been considered impossible to meet were met, if a little late,[15] and without the economic harm that industry had predicted. One noted authority on the Clean Air Act has stated flatly that in the 1980s, "motor vehicles were designed around the applicable emissions limits."[16]

There are similar well known examples, such as the cost of meeting regulations to reduce usage of ozone-depleting chlorofluorocarbons. Raytheon originally asserted that it simply could not find replacements for these solvents in cleaning electronic circuit boards at any cost; however, under the press of legal requirements, Raytheon found a replacement that not only *lowered* production costs, but increased consistency of product quality.[17] In the field of occupational health, such situations have been common.[18] Experience has shown that the costs of compliance cannot be predicted in advance

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[14] Michael Weisskopf, *Auto-Pollution Debate Has Ring of the Past; Despite Success, Detroit Resists*, Washington Post, March 26, 1990.

[15] CAA § 211, 42 U.S.C. § 7545.

[16] Arnold Reitze, *Mobile Source Air Pollution Control*, 6 Envt'l Lawyer 309, 327 (2000).

[17] Porter and van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 Journal of Econ. Persp. 97, 101 (1995).

[18] *See* Goodstein and Hodges, *Polluted Data*, The American Prospect, No. 35, 64-66 (Nov.-Dec. 1997).

because technology will change in response to the level of stringency the standards impose.

Third, costs of meeting health-based NAAQS also cannot be predicted because technology is not the only thing that develops and evolves under the pressure of legal mandates to meet health-based NAAQS. The regulatory climate itself changes, as regulators turn to control of sources that have not traditionally been controlled, but whose pollution contributions are significant percentage amounts of the total pollutant load. The 1990 Clean Air Act Amendments reflects such a change in the regulatory climate: recognizing the need for additional pollution reductions to meet the NAAQS in nonattainment areas, Congress for the first time ordered the Administrator to develop control technique guidance documents for sources whose control was not anticipated when the first NAAQS were adopted, including paints and coatings, solvents, and consumer products. CAA §§ 183(b), (e), 42 U.S.C. §§ 7511b(b), (e).[19] While States are not obliged to use these control options, the mere fact that they are now considered options opens the potential for reduction in overall costs of meeting the NAAQS.

Control of additional source categories potentially offers State regulators a way to reduce emissions without requiring large, traditionally regulated industries to develop yet more costly techniques to remove very small increments of remaining pollution. Since it is usually the first pollution controls applied that procure the largest emissions reduction for the cheapest price, the discovery of new source categories whose emissions could be cut back can reduce the overall costs of attaining the NAAQS.

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[19] In the South Coast Air Quality Management District in California, which includes the Los Angeles area, controls have been enacted on pleasure boats, airport ground vehicles, and bakeries, all sources whose control was not anticipated even a few years before. Daniel Selmi, *Impacts of Air Quality Regulation on Economic Development*, 13 Fall Nat. Resources & Env't 382 (1998).

Such changes in the regulatory climate, in the perception of who and what can and should be regulated, cannot always be foreseen when health-based standards are adopted, but can reduce costs of compliance in ways not expected or accounted for in cost estimates made before the shift in the regulatory climate occurs.

CONCLUSION

Amici States respectfully ask the Court to affirm the decision below in its holding that the Administrator may not consider costs of compliance in setting NAAQS, thereby also affirming the expressed intent of Congress to make this nation's air clean and safe to breathe.

Respectfully submitted,

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Nos. 99-1257 & 99-1426

In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* COMMONWEALTH OF VIRGINIA

The the Commonwealth of Virginia ("the *Amici* State") submits this brief as *amici curiae* in support of the American Trucking Association, Inc. and the States of Michigan, Ohio, and West Virginia. The *Amici* State supports the affirmation of the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir.), *reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999), which remanded the Environmental Protection Agency's ("EPA's") revised national ambient air quality standards ("NAAQS") for ozone and fine particulate matter.[1]

INTRODUCTION

This is not a case about whether cleaner air should be a national priority. The Amici State agrees that it must be, and Congress has so declared it. Instead, this is a case about how the standards for cleaner air shall be set. Are federal regulators to have unlimited discretion to set whatever arbitrary standards they wish? Or shall they be held accountable for what they do by being required to explain their decisions and base them on facts? More specifically, this case is a contest between two competing constructions of the key provision of the Clean Air Act, section 109, under which EPA is to set NAAQS "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of

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[1] This brief focuses on the ozone rulemaking. In the relating particulate matter proceeding before the court of appeals, the court held also that EPA violated the nondelegation doctrine. The *Amici* further supports the court's holding in this regard and believe that it dictates a similar conclusion in this case.

safety, [as] are requisite to protect the public health." 42 U.S.C. § 7409(b). Presented with two possible interpretations of § 109 - one that allows EPA unconfined and limitless discretion to alter the NAAQS and one that affords "intelligible principles" upon which to base such a change - the court of appeals was correct in adopting the latter. That is, the court was wholly justified in forcing EPA to explain its decision to revise air quality standards in such a manner as to facilitate a court's review.

INTEREST OF AMICUS CURIAE

The protection of public health and the environment is of manifest importance to the Commonwealth. In the furtherance of this policy, it fully supports strict regulation of air pollutants which threaten these interests. Congress established under the Clean Air Act, 42 U.S.C. § 7401, *et seq.* ("CAA"), a unique federal-state partnership for controlling air pollution. Under this partnership, EPA sets and revises the NAAQS under § 109; the States maintain primary responsibility for achieving these standards. CAA §§ 107-110; 42 U.S.C. §§ 7407-7410.

The Commonwealth has a unique interest in ensuring that the § 109 is construed in a way that best protects the public health and welfare of Virginians as well as their social and economic well being. It also strongly believes that the statute must be construed to uphold Congress' federal-state partnership. The Commonwealth is uniquely positioned to provide public law and policy arguments on these points on behalf of its citizens.

EPA's decisions in this case upset this federal-state partnership. EPA set new air quality standards without adequately articulating the health and environmental benefits of such action. While the benefit to health is not clear, there is no doubt that EPA's action would have vast and far ranging consequences to the welfare of all Virginians. And,

as the State partner under the Act, it is left to enforce such standards which may have been altered without adequate justification.

This amicus brief is submitted under S. Ct. Rule 37, which allow the States to file such briefs without permission of the parties and without leave of court.

STATEMENT OF FACTS

The parties have submitted lengthy briefs setting forth the detailed statutory and factual background of this case. The Commonwealth will not repeat that background here. It is necessary, however, to draw attention to facts which underscore the impact of EPA's standardless rulemaking in this case.

In the 1990 Amendments to the Clean Air Act, Congress revised the air quality standard for ozone at .12 part per million ("ppm"). 42 U.S.C. § 7511(a).[2] Ozone, unlike many other pollutants, is not directly emitted by sources. Instead, it is formed from the mixture of two chemical precursors, nitrogen oxides ("NOx") and a group of hydrocarbon pollutants called volatile organic compounds ("VOCs").[3]

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[2] As a result, States made designations for areas that did not meet the Congress' standard ("nonattainment areas") and EPA designated approximately 100 areas in the country as nonattainment for ozone. 56 Fed. Reg. 56694 (November 6, 1991). Congress included in its Amendments specific attainment deadlines for these areas; those deadlines are keyed to whether areas were classified as either "marginal," "moderate," "serious," "severe," or "extreme." CAA § 181(a)(1); 42 U.S.C. § 7511(a)(1).

[3] These precursors cook in the sun, during hot weather, and produce ozone through a complex chain of chemical reactions. The creation of ozone is a seasonal phenomenon, with concentrations peaking in the summer, and as a diurnal occurrence, with concentrations peaking during the afternoon and

These precursors originate from a wide variety of natural and man-made sources. Indeed, they come from virtually every facet of modern American life, including operating automobiles, trucks, buses, trains, manufacturing facilities, and electrical power plants.

Congress' ozone scheme has been quite effective in reducing ozone levels throughout the United States. According to EPA data, between 1987 and 1996, ambient ozone concentrations in the United States decreased by 15 percent; exceedances of the NAAQS decreased by 73 percent. Office of Air Quality Planning and Standards, EPA, National Air Quality and Emissions Trends Report, 1996, EPA Doc. NO. 454/R-97-013, http://www.epa.gov/oar/aqtrnd96/trendsfs.html.

Virginia's air quality has greatly improved under Congress' mandate. In the early 1990s, Virginia designated eleven counties and seventee cities in nonattainment for the ozone NAAQS. VR 120-01, Appendix K, January 1, 1992. Today, only the five counties and five cities in Northern Virginia, surrounding Washington D.C., are in nonattainment. 9 VAC 5-20-204.

Against this backdrop of improving air quality, EPA adopted new and far more stringent air quality standards for ozone, reducing allowable levels from the .12 ppm standard to .08 ppm measured over an 8-hour period. National Ambient Air Quality Standards for Ozone: Final Rule, 62 Fed. Reg. 38,855 (July 18, 1997). EPA did so without pinpointing specific health benefits, if any, of this radical change or demonstrating why the change was required. EPA found it hard to differentiate health benefits associated with this new standard or to demonstrate the elimination of a

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falling during the night. *See Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997).

significant risk to public health. The Clean Air Scientific Advisory Committee ("CASAC"), upon which EPA relies in setting air standards, advised EPA that "there is no 'bright line'" distinguishing any of the alternatives as "significantly more protective of public health." Letter from George Wolff, Chairman, CASAC, to Carol Browner, Administrator, regarding CASAC Closure on the Primary Standard Portion of the Staff Paper for Ozone at 3 (November 30, 1995). It even highlighted a particular study demonstrating "small" health differences between "outdoor" children exposed to ozone at the existing .12 standard and those exposed to ozone at levels even more stringent that the .08 standard at issue. *Id.* In fact, CASAC was divided as to what ozone standard to adopt; a majority of the members supported a standard less stringent than .08 ppm. National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,728 (December 13, 1996).

Moreover, EPA seemingly ignored other important public health information relevant to ozone. For example, EPA acknowledged that, due to ozone's screening effect on harmful ultraviolate radiation, the reduction in ozone levels mandated by its new standard will increase malignant and nonmelanoma skin cancers and cataracts. EPA, Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers (Draft September, 1994). The Department of Energy predicted literally thousands of new cases of skin cancer and cataracts each year. Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995).

As a result, EPA offered only vague references to "the nature and severity" of health effects, "the size of the sensitive population(s) at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35, citing Ozone Final Rule, 62 Fed. Reg. at 38,883. In short, EPA's decision is not based on science. *See* Proposed Rule, 61 Fed. Reg. at 65727.

While there is not clear health benefit, there is no doubt that this rulemaking would have vast and far ranging consequences. Nationwide, the new standard will place 20% of American counties into nonattainment. Brobeck, Phleger & Harrison LLP, Science and the High Cost of Cleaner Air, October 19, 1997. EPA's own regulatory impact analysis estimates the overall cost of complying with the NAAQS to be $9.6 billion annually. Innovative Strategies and Economics Group, EPA, Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule ES-12 (1997). By contrast, EPA estimates total yearly benefits from compliance at between $1.5 and $8.5 billion. *Id.* at ES-17. Other studies are not so conservative. The American Petroleum Institute estimates the cost of achieving the new NAAQS ranging from $2.5 to 7.0 billion *in the Chicago metropolitan area alone*. The Monetary Benefits of An 8-Hour 0.08 ppm Ozone Standard in Chicago, Research Study # 085, August, 1996. Another study suggests costs of $40 to $60 billion per year. Science and the High Cost of Cleaner Air, Brobeck, Phleger & Harrison LLP, October 19, 1997.

In Virginia, preliminary projections indicate that 17 counties and 21 cities will be in nonattainment under the .08 standard, including all of its major metropolitan areas. This portends profound economic and social consequences for the Commonwealth and its citizens.

In practical terms, States, which must implement the new standard,[4] will be required to limit emissions from "sources,"

[4] Once EPA revises an air standard, the Act requires that the Commonwealth develop and submit to EPA a state implementation plan ("SIP") under which it will implement, maintain and enforce the new standard. CAA §110(a)(1); 42 U.S.C. 7410(a)(1). The SIP must "include enforceable emission limitations and other control measures, means, or techniques

including automobiles, trucks, buses, trains, manufacturing facilities, refineries, and electrical power plants. A manufacturing plant, for example, may be forced to reduce emissions to meet State requirements by shifting capital from plant expansion to the purchase of advanced technology pollution control equipment or by reducing its hours of operation. CAA §§ 108(a)(2)(A), (b)(2); 42 U.S.C. §§ 7408(a)(2)(A), (b)(2). Either option could cost workers jobs and result in higher prices for consumers. An electric utility may be forced to reduce emissions by changing its fuel source to cleaner burning coal imported from outside the region, thus driving up prices for consumers. Ordinary citizens may be required to reduce automobile emissions by submitting to emissions testing and making expensive equipment upgrades for older models. CAA §§ 182(a)(2)(B)(i), (b)(4), (c)(3); 42 U.S.C. §§ 7511. In some cases, States may even be required to institute transportation control measures to offset growth or bring emissions within projected levels. CAA §§ 182 (c)(5, (d)(1)(A); 42 U.S.C. §§ 7511a. That is, citizens may be required to curtail automobile travel and the use of recreational vehicles and other mechanized equipment. In addition, in nonattainment areas, businesses are unable to locate or expand unless new emissions are offset by reductions elsewhere. *See* CAA §§ 182(a)(4), (b)(5), (c)(10) (d)(2), (e)(1); 42 U.S.C. § 7511. Faced with a choice between locating in a nonattainment or attainment area, businesses will pass by the nonattainment area in favor of other areas. Whole communities will be shackled from development, stunting growth, development, and quality of life for its citizens.

(including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act." CAA §110 (a)(2)(A); 42 U.S.C. 7410(a)(2)(A).

The costs are even higher under the Act if a State fails to implement such measures in nonattainment areas. The Act allows the Administrator to choose between cutting of federal highway funds and imposing additional emission offset requirements for new source permits. CAA § 179; 42 U.S.C. § 7509. One estimate suggests that 72% of highway construction jobs in Virginia would be threatened by such sanctions and $311,000,843 in highway funds are at stake. Economic Impact of Proposed EPA Ozone and PM Standards on the US Highway Construction Industry, ARTBA, (May, 1997).

Certainly, radical changes such as the new ozone standard must be based on "intelligible principles" that will facilitate a court's review. EPA failed to articulate such principles. Rather, it hides behind laudable statutory goals; at the same time, it conceals the real policy driven basis for the regulatory actions at issue.

SUMMARY OF ARGUMENT

A federal agency must explain its regulatory decisions in such a manner as to allow "meaningful judicial review." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (three judge panel). *E.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Mistretta v. United States*, 488 U.S. 361, 379 (1989). The nondelegation doctrine "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 685-86 (1980) (*"Benzene"*).

Under section 109(b), EPA is to set NAAQS "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b). Attempting to alter a

Congressionally ratified standard for ozone, EPA adopted a new, more stringent standard without the minimal finding that the new standard was "requisite" or not requisite "to protect the public health" with "an adequate margin of safety," the formula set out by § 109(b)(1). As a result, the court of appeals was correct in concluding that EPA had not articulated "intelligible principles" in deciding whether and how to revise the ozone and particulate matter NAAQS. The court of appeals' decision is consistent with precedent and guarantees that the States and their citizens will not be without recourse to challenge arbitrary government action.

ARGUMENT

I. The Court of Appeals Was Correct In Remanding The Rulemakings to EPA In Order to Allow the Agency To Explain Its Reasoning.

The nondelegation doctrine "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Benzene*, 448 U.S. at 685-86. As explained below, the court of appeals was correct to remand the revised standards to the agency "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038.

Prior to EPA's challenged rulemaking, Congress set the ozone standard at .12 ppm. Section 109 of the Clean Air Act dictates that EPA's revised standard must be at a level "requisite to protect public health" with "an adequate margin of safety." Ozone itself complicates this statutory directive; it is a non-threshold pollutant – meaning that there is no level below which all health risks disappear. 175 F.3d at 1034; 62 Fed. Reg at 38,863. *See also Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146, 1148 (D.C. Cir. 1987) (*"Vinyl Chloride"*) (a "non-threshold" pollutant is one that "appears to create a risk to health at all non-zero levels of

emission"). Thus, in order to change the level imposed by Congress to something other than zero, EPA must explain why it settled on a specific level, and not some other, because any presence of ozone is presumed to present some threat to health or the environment.

But EPA failed to provide the court of appeals with any ascertainable standard which might have facilitated the court's review of its action. It did not identify a level of air quality that is "requisite" to protect public health. That is, EPA does not elucidate why measuring ozone at .08 ppm is requisite while other levels – for example, .07 ppm or .09 ppm - are not. EPA did not explain how the level it chose presents "an adequate margin of safety." The court of appeals carefully reviewed the administrative record and found that EPA's three primary reasons for its new NAAQS amounts to nothing more than a reflection that lower levels moving towards zero "are associated with lower risk to public health." 175 F.3d at 1035. Given that ozone is created naturally in the environment and that the results of EPA's standardless revision have the potential of affecting nearly every aspect of modern life, including the operation of automobiles, trucks, buses, trains, manufacturing facilities, and electrical power plants, the court was entirely correct.

The court of appeals decision to remand was not novel or drastic. Indeed, it is entirely consistent with this Court's jurisprudence. As Chief Justice Rehnquist has explained the nondelegation doctrine serves important functions:

First, and most abstractly, [the nondelegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the

delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607, 685-86 (1980) (*"Benzene"*).

This case does not involve the first or second components of the Chief Justice's narrative. The court of appeals has not determined that § 109 delegated too much power to a federal agency, *e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down Bituminous Coal Conservation Act of 1935), or failed to set forth standards to constrain agency discretion. Rather, this case involves the final component - the court deployed the nondelegation doctrine as a tool of statutory construction to prevent a federal agency from interpreting its delegated authority so broadly as to give it unfettered, and virtually unreviewable, discretion.

The court of appeals' decision is entirely consistent with its own precedent. That court has not hesitated to require federal agencies to explain their reasoning in order that such reasoning could be reviewed. *See, e.g., American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), *cert. denied*, 120 S.Ct. 58 (1999) (remanding for EPA to determine what risks are tolerable); *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) (remanding lockout/tagout regulation so that OSHA could articulate principles constraining its application of rulemaking authority under the OSH Act), *on remand*, 37 F.3d 665 (D.C. Cir. 1994) (approving regulations because agency supplied sufficient list of principles).

The court of appeals decision also is workable. EPA itself admits in its Petition for Certiorari that it might be able to discern such intelligible principles under § 109. For

example, EPA calls attention to the Clean Air Act's legislative history, which requires EPA to focus on health effects that are "medically significant," and not "merely detectable," and which requires it to consider the "public health," and not "individual health." Petition at 15.

In short, EPA did not articulate intelligible principles in deciding whether and how to revise the NAAQS. EPA should not be free to ratchet its standards ever more stringently based solely on whim or conjecture. This Court should affirm the court of appeals and require that EPA explain its reasoning why its new standard is required.

II. EPA's Interpretation of § 109 of the Clean Air Act Leads to Absurd and Unjust Results.

Presented with two possible interpretations of § 109 – one that allows EPA virtually unlimited discretion to alter the ozone NAAQS and one that precludes it - the court of appeals was obligated to interpret it in a way that avoids an absurd and unjust result.

This Court has long held that where a statute is susceptible of more than one interpretation, a court must avoid an interpretation that leads to an absurdity or an unjust result, if an alternate, reasonable interpretation may be found:

If a literal construction of the words of a statute be absurd, the act must be so constructed to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed.

Holy Trinity Church v. United States, 143 U.S. 457, 460 (1892). "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed

that the Legislature intended exceptions to its language, which would avoid results of this character." *United States v. Kirby*, 74 U.S. 482, 486-87 (7 Wall. 482) (1869).

In this case, the court of appeals' interpretation of § 109, which precludes EPA from implementing new air standards without adequately explaining why, avoids absurd and unjust results. Indeed, following EPA's reasoning to its logical conclusion, it is not difficult to ascertain the absurdity of altering the existing standards for ozone without such an explanation. First, as explained above, ozone is a non-threshold pollutant – meaning that there is no level below which all health risks disappear. Without being required to explain why its new standard is "requisite" or not requisite "to protect the public health" with "an adequate margin of safety," the formula set out in § 109, EPA conceivably is free to ratchet its standard ever more stringently based solely on some incremental health risk. Such a result could have, in practical terms, devastating social and economic consequences. As explained above, both the natural environment and activities involving nearly every aspect of modern life result in emission of the precursor elements for ozone, including the operation of automobiles, trucks, buses, trains, manufacturing facilities, and electrical power plants. In light of the controls States are required to implement for nonattainment areas, the consequences of setting an exceedingly stringent ozone NAAQS are not hard to conceptualize. They include reduced economic development, wholesale reduction of business activities, with the attendant increase in unemployment, higher production and transportation costs, which will be passed on to the consumer, higher utility costs and/or reduction in electrical supplies, with attendant health consequences for those without adequate climate control, and limitations upon the use of personal automobiles. Surely Congress did not intend EPA to exercise such power without identifying a standard against which a court might gauge its merit.

The lower court's decision in *International Union* illustrates the point. There OSHA issued new regulations requiring that employers install safety devices on machinery that could suddenly move and injure workers. Employers were required to install locks to keep the machines from starting or post warning tags. 938 F.2d at 1312. In remanding the standard to OSHA, the court was particularly wary of the agency's reliance on incremental improvement for workplace safety as justification for the regulation. "The upshot is an asserted power, once significant risk is found, to require precautions that take the industry to the verge of economic ruin (so long as the increment reduces a significant risk) . . . or to do nothing at all. All positions in between are evidently equally valid." 938 F.2d at 1317 (citations omitted). Moreover, the court recognized "the power to vary the stringency of the standard is the power to decide which firms will live and which will die. At the simplest level, for example, compliance may involve economies of scale, so that a tough standard will erase small, marginal firms and leave the field to a small group of larger ones." *Id.* The Court remanded the standard to OSHA and upheld it only after remand when OSHA returned with a "Supplemental Statement of Reasons" for the regulation, which included significant risk, feasibility, and cost-effectiveness. *International Union, UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994).

The court's concerns in *International Union* are equally applicable to the case at bar. Like the potential power asserted by OSHA in *International Union*, EPA's assertion of authority in this case allows it to adopt any level of ozone with "[a]ll positions in between are evidently equally valid." From a practical standpoint, EPA would have the power to decide which communities will remain vibrant and growing and which will not simply by picking a number.

III. EPA Must Consider Costs and Other Social and Economic Factors When It Identifies a Level of Ozone That Is "Requisite" To Protect "Public Health."

For the reasons set out above, *Amici* submit that the court of appeals was correct in remanding the ozone and particulate matter standards to EPA in order to articulate "a determinate standard on its own." 175 F.3d at 1038. If the Court affirms the court of appeals on this issue, *Amici* further submit that EPA must be able to consider social and economic factors and indirect public health effects forclosed by the court of appeals decision in *Lead Industries Asss'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980.) The cross-petitioners in Case 99-1426 have already submitted detailed briefs on this issue and *Amici* will not repeat those arguments here. In short, "a standard-setting process that ignored economic considerations would result in a serious misallocation of resources and a lower effective level of safety than could be achieved under standards set with reference to the comparative benefits available at a lower cost." *Benzene*, 448 U.S. at 670. *Amici* fully support the positions stated in the briefs submitted by the States of Ohio, Michigan, and West Virginia and the American Trucking Associations.

CONCLUSION

EPA's rulemaking in this case stands as a stark example of a federal agency's unconfined and vagrant use of delegated power. The court of appeals should be affirmed.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA

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